

EXHIBIT A

To

Declaration of Jeffrey B. Coopersmith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) DECEMBER 7, 2022
 RAMESH "SUNNY" BALWANI,)
) PAGES 1 - 152
 DEFENDANT.)
 _____) SENTENCING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:
IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: SHAWN ESTRADA
REESE ONATE
SERENA NICHOLS
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105

BY: JEFFREY COOPERSMITH
AARON BRECHER
AMANDA MCDOWELL
701 FIFTH AVENUE, SUITE 5600
SEATTLE, WASHINGTON 98104

BY: STEPHEN CAZARES
77 SOUTH FIGUEROA STREET, SUITE 3200
LOS ANGELES, CALIFORNIA 90017

BY: AMY WALSH
51 W 52ND STREET
NEW YORK, NEW YORK 10019

FOR U.S. PROBATION: JESSICA GOLDSBERRY

ALSO PRESENT: OFFICE OF THE U.S. ATTORNEY
BY: MADDI WACHS, PARALEGAL

UNITED STATES POSTAL INSPECTION SERVICE
BY: CHRISTOPHER MCCOLLOW

FEDERAL BUREAU OF INVESTIGATION
BY: MARIO C. SCUSSEL

UNITED STATES FOOD & DRUG
ADMINISTRATION
BY: GEORGE SCAVDIS

1 SAN JOSE, CALIFORNIA

DECEMBER 7, 2022

2 P R O C E E D I N G S

10:09AM 3 (COURT CONVENED AT 10:09 A.M.)

10:09AM 4 THE COURT: LET'S CALL OUR MORNING MATTER.

10:09AM 5 THIS IS 18-258, UNITED STATES VERSUS

10:09AM 6 RAMESH "SUNNY" BALWANI.

10:09AM 7 LET ME FIRST CAPTURE THE APPEARANCES OF THE PARTIES.

10:09AM 8 WHO APPEARS FOR THE GOVERNMENT?

10:09AM 9 MR. LEACH: GOOD MORNING, YOUR HONOR.

10:09AM 10 ROBERT LEACH ON BEHALF OF THE UNITED STATES.

10:09AM 11 I'M JOINED BY JOHN BOSTIC AND JEFF SCHENK

10:09AM 12 THE COURT: THANK YOU. GOOD MORNING.

10:09AM 13 AND FOR THE DEFENDANT?

10:09AM 14 MR. COOPERSMITH: GOOD MORNING, YOUR HONOR.

10:09AM 15 JEFF COOPERSMITH FOR MR. BALWANI.

10:09AM 16 MR. BALWANI IS PRESENT.

10:09AM 17 I'M JOINED BY MY COLLEAGUES, AMY WALSH, STEPHEN CAZARES,

10:09AM 18 AND MOST OF OUR TEAM, AMANDA, SHAWN ESTRADA, REESE ONATE,

10:09AM 19 AARON BRECHER, SERENA NICHOLS, AND MOST OF MR. BALWANI'S FAMILY

10:09AM 20 IS SEATED BEHIND THAT ROW.

10:10AM 21 THE COURT: THANK YOU. GOOD MORNING. IT'S NICE TO
10:10AM 22 SEE EVERYONE.

10:10AM 23 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:10AM 24 THE COURT: WE ARE HERE THIS MORNING FOR THE
10:10AM 25 SENTENCING IN THIS MATTER HAVING HEARD THE JURY'S VERDICT THAT

10:10AM 1 WAS RETURNED AND SUBSEQUENT TO THE TRIAL IN THIS MATTER.

10:10AM 2 LET ME INDICATE AND ASK FIRST, ARE ALL PARTIES READY TO
10:10AM 3 PROCEED?

10:10AM 4 MR. LEACH: YES, YOUR HONOR.

10:10AM 5 MR. COOPERSMITH: YES, YOUR HONOR.

10:10AM 6 THE COURT: ALL RIGHT. THANK YOU.

10:10AM 7 AND WHO APPEARS FOR PROBATION?

10:10AM 8 PROBATION OFFICER: GOOD MORNING, YOUR HONOR.

10:10AM 9 JESSICA GOLDSBERRY FOR U.S. PROBATION.

10:10AM 10 THE COURT: THANK YOU. GOOD MORNING.

10:10AM 11 LET ME INDICATE THE DOCKETS THAT I HAVE REVIEWED IN THIS
10:10AM 12 MATTER IN ANTICIPATION OF PREPARATION OF THE SENTENCING.

10:10AM 13 FIRST OF ALL, I HAVE REVIEWED THE PSR, WHICH IS DOCKET
10:10AM 14 1647; I'VE REVIEWED THE GOVERNMENT'S SENTENCING MEMORANDUM,
10:10AM 15 1661; THE DEFENSE MEMORANDUM, 1662, I BELIEVE IT IS. THERE WAS
10:11AM 16 A DEFENDANT'S APPENDIX A THAT WAS -- LET'S SEE. THAT WAS FILED
10:11AM 17 ON NOVEMBER 30TH, YES.

10:11AM 18 AND 1665 WERE DEFENDANT'S EXHIBITS; 1671 WAS THE DEFENSE
10:11AM 19 RESPONSE TO THE GOVERNMENT'S MEMO WITH EXHIBITS; 1674 WAS THE
10:11AM 20 GOVERNMENT'S RESPONSE TO DEFENDANT'S MEMO; AND THEN AS RECENTLY
10:11AM 21 AS YESTERDAY AT 1:34 P.M., 1677 I BELIEVE IT WAS 100 PAGE
10:11AM 22 DOCUMENT, SUPPLEMENTAL EXPERT REPORT THAT WAS FILED BY THE
10:11AM 23 DEFENSE.

10:11AM 24 DID THE GOVERNMENT GET THAT SUPPLEMENTAL REPORT?

10:11AM 25 MR. LEACH: WE DID, YOUR HONOR. THANK YOU.

10:11AM 1 THE COURT: ALL RIGHT. THANK YOU.

10:11AM 2 THOSE ARE THE DOCUMENTS THAT THE COURT RECEIVED AND
10:11AM 3 CONSIDERED, INCLUDING THE EXHIBITS.

10:11AM 4 LET ME INDICATE THAT THERE WERE MANY, MANY LETTERS OF
10:11AM 5 SUPPORT OF MR. BALWANI THAT WERE ALSO CONTAINED IN THOSE
10:12AM 6 EXHIBITS, AND THE COURT HAS READ AND REVIEWED THOSE AS WELL.

10:12AM 7 ARE THERE ANY OTHER DOCUMENTS THAT THE PARTIES WANT TO
10:12AM 8 BRING TO MY ATTENTION?

10:12AM 9 MR. LEACH: NO, YOUR HONOR.

10:12AM 10 MR. COOPERSMITH: NO, YOUR HONOR. YOU'VE COVERED
10:12AM 11 IT. THANK YOU.

10:12AM 12 THE COURT: THANK YOU.

10:12AM 13 LET ME ASK PROBATION THEN AS TO THE PSR, ARE THERE ANY
10:12AM 14 CHANGES, ADDITIONS, DELETIONS TO THE PRESENTENCE REPORT?

10:12AM 15 MR. COOPERSMITH: NO, YOUR HONOR.

10:12AM 16 THE COURT: ALL RIGHT. THANK YOU.

10:12AM 17 AND THE PARTIES DID RECEIVE THAT IN A TIMELY MATTER.

10:12AM 18 WHAT I'D LIKE TO DO INITIALLY IS TO REVIEW THE OBJECTIONS.
10:12AM 19 THERE WERE OBJECTIONS MADE TO THE PSR.

10:12AM 20 WHAT I THOUGHT I WOULD DO, I BELIEVE THERE WERE A TOTAL OF
10:12AM 21 39 OBJECTIONS FILED BY THE DEFENSE AS TO THE PSR, INCLUDING
10:12AM 22 OBJECTIONS IN THE APPENDIX A THAT WAS ATTACHED TO THE DEFENSE
10:12AM 23 SENTENCING MEMORANDUM.

10:13AM 24 AND GIVEN THE QUANTITY OF THOSE OBJECTIONS, I HAVE DIVIDED
10:13AM 25 THOSE INTO TWO CATEGORIES THAT I TITLED CONTEXTUAL AND

10:13AM 1 SUBSTANTIVE.

10:13AM 2 THE SUBSTANTIVE OBJECTIONS, LET ME PARSE THOSE OUT FIRST,
10:13AM 3 THOSE ARE -- AND I'VE IDENTIFIED THOSE AS OBJECTIONS, AND THESE
10:13AM 4 ARE DEFENSE OBJECTIONS THIRTEEN, TWENTY-TWO, TWENTY-THREE, AND
10:13AM 5 TWENTY-FOUR, AND I'LL TALK ABOUT THOSE SEPARATELY.

10:13AM 6 THE BALANCE I'VE LABELLED CONTEXTUAL. AND WHAT I WOULD
10:13AM 7 LIKE TO DO IS GO THROUGH THOSE INITIALLY, AND THEN WE'LL GO
10:13AM 8 THROUGH THE SUBSTANTIVE.

10:13AM 9 IN THIS ANALYSIS, I THINK YOU'LL FIND THAT THE SUBSTANTIVE
10:13AM 10 OBJECTIONS REALLY RELATE TO LOSS AND GUIDELINE CALCULATIONS,
10:13AM 11 WHICH ARE OF INTEREST TO THE PARTIES.

10:13AM 12 I NOTE THAT THE GOVERNMENT ALSO FILED AN OBJECTION, AND I
10:14AM 13 HAVE THAT HERE.

10:14AM 14 LET ME ASK, IS THERE ANYTHING ELSE THAT YOU WOULD LIKE ME
10:14AM 15 TO KNOW, MR. LEACH, IN REGARDS TO THE GOVERNMENT'S OBJECTION?

10:14AM 16 MR. LEACH: NO, YOUR HONOR.

10:14AM 17 I THINK AS WE RELAY IN THE BRIEF THAT IN PREPARING THE
10:14AM 18 PSR, IT APPEARED THAT PROBATION RESOLVED SOME OBJECTIONS BY
10:14AM 19 PUTTING IN ARGUMENT WHERE -- WE'VE HIGHLIGHTED TWO OF THOSE
10:14AM 20 PARAGRAPHS FOR THE COURT.

10:14AM 21 WE DON'T THINK IT'S NECESSARY TO PARSE THE PSR IN QUITE
10:14AM 22 THAT WAY.

10:14AM 23 I THINK THE COURT SAT THROUGH TWO TRIALS WITH A LENGTHY
10:14AM 24 RECORD, AND WE WANTED TO HIGHLIGHT THOSE TO THE COURT BECAUSE
10:14AM 25 THERE WERE ELEMENTS THAT WE DISAGREED WITH, BUT AS WE SAY IN

10:14AM 1 OUR PAPERS, I DON'T THINK IT'S NECESSARY FOR THE COURT TO
10:14AM 2 RESOLVE THOSE OBJECTIONS FOR PURPOSES OF SENTENCING. AND I
10:14AM 3 WOULD IMAGINE THEY FALL INTO THE CATEGORY OUTSIDE OF THIRTEEN,
10:14AM 4 TWENTY-TWO, TWENTY-THREE, AND TWENTY-FOUR THAT YOUR HONOR JUST
10:15AM 5 DESCRIBED.

10:15AM 6 THE COURT: OKAY. THANK YOU.

10:15AM 7 MR. COOPERSMITH, YOU'RE AT THE LECTERN.

10:15AM 8 MR. COOPERSMITH: OH, I JUST THOUGHT IT WOULD BE
10:15AM 9 ABOUT THAT TIME TO APPROACH, BUT I HAVE NOTHING TO ADD AT THIS
10:15AM 10 PARTICULAR MOMENT.

10:15AM 11 THE COURT: WELL, THANK YOU.

10:15AM 12 THE GOVERNMENT'S OBJECTIONS WERE, AS YOU STATED,
10:15AM 13 MR. LEACH, TO -- I THINK YOUR OPINION IS THAT THE DEFENSE
10:15AM 14 SEEMED TO -- AND THEIR INTENT AND REQUEST WAS TO ADD CERTAIN
10:15AM 15 LANGUAGE TO VARIOUS PARAGRAPHS. AND I'VE LOOKED AT THOSE,
10:15AM 16 INCLUDING THE EXAMPLES 17, 23 AND OTHERS THAT YOU SUGGEST.

10:15AM 17 AND LET ME JUST INDICATE THAT YOU ARE RIGHT, AND YOU HAVE
10:15AM 18 A GOOD MEMORY, I DID SIT THROUGH BOTH TRIALS, AND I WAS ABLE TO
10:15AM 19 HEAR THE EVIDENCE IN THAT.

10:15AM 20 THE STATEMENTS THAT YOU'VE RAISED THERE, I'M GOING TO
10:15AM 21 INVOKE FEDERAL RULE OF CRIMINAL PROCEDURE 32(I) (3) (B) AND
10:15AM 22 INDICATE THAT THE COURT NEED NOT RULE ON THOSE OBJECTIONS
10:15AM 23 BECAUSE THE COURT IS NOT GOING TO CONSIDER THAT TYPE OF
10:15AM 24 INFORMATION AS YOU'VE INDICATED. AND I THINK PART OF THIS --
10:16AM 25 IN ITS SENTENCING DECISION.

10:16AM 1 AND PART OF THIS WILL COME OUT IN OUR DISCUSSION ABOUT THE
10:16AM 2 BALANCE OF THE OBJECTIONS. SO THANK YOU FOR THAT.

10:16AM 3 ANYTHING FURTHER ON THAT?

10:16AM 4 MR. LEACH: NO, YOUR HONOR.

10:16AM 5 MR. COOPERSMITH: NO, YOUR HONOR.

10:16AM 6 THE COURT: GREAT. THANK YOU.

10:16AM 7 WELL, LET'S GO THROUGH WHAT I'VE IDENTIFIED AS CONTEXTUAL
10:16AM 8 OBJECTIONS. AND THESE ARE CONTAINED, FIRST OF ALL, IN THE PSR
10:16AM 9 ITSELF BEGINNING IN THE ADDENDUM TO THE PRESENTENCE REPORT AND
10:16AM 10 THEN IN APPENDIX A SENTENCING MEMORANDUM THAT CONTAINED 24
10:16AM 11 THROUGH 39 I THINK THE BALANCE OF THE OBJECTIONS.

10:16AM 12 LET ME FIRST SAY THAT I HAVE READ AND REVIEWED THE
10:16AM 13 OBJECTIONS THAT ARE CONTAINED IN THE PSR. THOSE ARE 1 THROUGH
10:17AM 14 24, I BELIEVE.

10:17AM 15 LET ME ASK, MS. GOLDSBERRY, IS THERE ANYTHING ELSE YOU
10:17AM 16 WOULD LIKE TO ADD TO ANY OF PROBATION'S RESPONSES TO THOSE
10:17AM 17 OBJECTIONS?

10:17AM 18 PROBATION OFFICER: NO, YOUR HONOR.

10:17AM 19 THE COURT: ALL RIGHT. THANK YOU.

10:17AM 20 ANYTHING FURTHER YOU WOULD LIKE TO ADD TO THE OBJECTIONS,
10:17AM 21 MR. COOPERSMITH?

10:17AM 22 MR. COOPERSMITH: NOT ON THOSE, YOUR HONOR. WE PUT
10:17AM 23 THAT IN THE RECORD, AND WE THINK THE COURT IS FAMILIAR WITH THE
10:17AM 24 CASE OBVIOUSLY. WE STAND BY THOSE, BUT WE DON'T THINK IT'S
10:17AM 25 NECESSARY TO ARGUE THOSE ONE BY ONE.

10:17AM 1 THE COURT: OKAY. ANYTHING FURTHER --

10:17AM 2 MR. LEACH: NO, YOUR HONOR.

10:17AM 3 THE COURT: -- ON THOSE OBJECTIONS?

10:17AM 4 MR. LEACH: NO, YOUR HONOR.

10:17AM 5 THE COURT: ALL RIGHT. THANK YOU.

10:17AM 6 WHAT I INTEND TO DO IS JUST TO GO THROUGH AND INFORM YOU
10:17AM 7 OF THE COURT'S DECISION AS TO THOSE OBJECTIONS.

10:17AM 8 OBJECTION NUMBER ONE IS THE OBJECTION TO PARAGRAPH NUMBER
10:17AM 9 18 OF THE PSR, AND THAT OBJECTION IS OVERRULED. THE COURT
10:18AM 10 FINDS THAT THIS SUMMARY IS SUBSTANTIVELY THE SAME AS THE SCHEME
10:18AM 11 TO DEFRAUD IN THE THIRD SUPERSEDING INDICTMENT, AND I'LL ALLOW
10:18AM 12 THAT TO REMAIN.

10:18AM 13 OBJECTION NUMBER TWO GOES TOWARDS THE PARAGRAPH 19, AND
10:18AM 14 THE COURT FINDS THAT THE OBJECTION OR THE RULING ON THIS IS
10:18AM 15 UNNECESSARY, AGAIN, CITING FEDERAL RULE OF CRIMINAL PROCEDURE
10:18AM 16 32(I) (3) (B), AND THE COURT WILL NOT CONSIDER PRE-2010
10:18AM 17 PRE-CONSPIRACY SAFEWAY RELATIONSHIP IN THE DEFENDANT'S
10:18AM 18 SENTENCING.

10:18AM 19 MR. COOPERSMITH: YOUR HONOR, JUST TO CLARIFY.
10:18AM 20 OBJECTION NUMBER TWO I BELIEVE RELATES TO FINAL PSR PARAGRAPH
10:18AM 21 20?

10:18AM 22 THE COURT: 20, YES.

10:18AM 23 MR. COOPERSMITH: YES, YOUR HONOR.

10:18AM 24 THE COURT: YES. IF I SAID 19, I MEANT 20, YES.

10:18AM 25 MR. COOPERSMITH: YES.

10:18AM 1 THE COURT: IT'S 20 IN THE FINAL PARAGRAPH. IT'S 19
10:18AM 2 IN THE DRAFT.

10:18AM 3 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

10:19AM 4 THE COURT: OBJECTION THREE RELATES TO PARAGRAPH 21,
10:19AM 5 AND I'M GOING TO SUSTAIN IN PART THIS OBJECTION.

10:19AM 6 AND I WILL -- THE THIRD BOLD REFERENCE IN THIS PARAGRAPH
10:19AM 7 THAT REFERENCES BALWANI, THE NAME BALWANI, WE'LL STRIKE THAT.

10:19AM 8 AND THE FOLLOWING SENTENCE, I THINK IT'S FIVE LINES DOWN,
10:19AM 9 MS. GOLDSBERRY, THE WORD, THE FOURTH WORD IN THAT IS "THEY,"
10:19AM 10 THAT SHOULD BE CHANGED TO "WAS."

10:19AM 11 PROBATION OFFICER: COULD THE COURT TELL ME THE
10:19AM 12 WHOLE SENTENCE?

10:19AM 13 THE COURT: "IF YOU SEE." LET ME SAY, THERE ARE
10:20AM 14 SOME CHANGES HERE WE'RE GOING TO HAVE TO DO. THE PSR, AS YOU
10:20AM 15 KNOW, IS CONFIDENTIAL.

10:20AM 16 MR. COOPERSMITH: YES.

10:20AM 17 THE COURT: SO I'M RETICENT TO READ WHOLESALE
10:20AM 18 INFORMATION.

10:20AM 19 PROBATION OFFICER: I UNDERSTAND.

10:20AM 20 THE COURT: BUT I'M TRYING TO GIVE YOU GUIDANCE ON
10:20AM 21 WHERE IT IS, AND, OF COURSE, I'LL HAVE TO READ SOME WORDS IN.

10:20AM 22 BUT IF YOU'LL GO DOWN ONE, TWO, THREE, FOUR -- FIVE LINES
10:20AM 23 DOWN, THAT SENTENCE BEGINS WITH THE WORD "THERANOS."

10:20AM 24 PROBATION OFFICER: YES.

10:20AM 25 THE COURT: AND THE WORD "THEY" IN THAT SENTENCE

10:20AM 1 WILL BE CHANGED TO "WAS."

10:20AM 2 PROBATION OFFICER: "WAS."

10:20AM 3 THE COURT: AND IN THE PRECEDING SENTENCE FOLLOWING

10:20AM 4 THE WORD "HOLMES," THE NEXT TWO WORDS WILL BE STRICKEN,

10:20AM 5 INCLUDING MR. BALWANI'S NAME IN BOLD.

10:20AM 6 PROBATION OFFICER: THE SENTENCE BEFORE?

10:20AM 7 THE COURT: CORRECT.

10:20AM 8 PROBATION OFFICER: OKAY.

10:20AM 9 THE COURT: SO THE WORDS "AND BALWANI," FOLLOWING

10:20AM 10 THE WORD "HOLMES," WILL BE DELETED.

10:21AM 11 PROBATION OFFICER: OKAY. GOT IT.

10:21AM 12 THE COURT: OBJECTION FOUR IS OVERRULED. THIS IS AN

10:21AM 13 ACCURATE DESCRIPTION, AND IT DOES PROVIDE CONTEXT.

10:21AM 14 OBJECTION FIVE IS OVERRULED. THIS RELATES TO PARAGRAPH

10:21AM 15 26. THE COURT FINDS THAT THIS PARAGRAPH CORRECTLY STATES THE

10:21AM 16 EVIDENCE THAT WAS INTRODUCED AT TRIAL.

10:21AM 17 OBJECTION SIX IS OVERRULED. I'LL NOTE THAT AT THE -- THIS

10:21AM 18 IS ONE OF THOSE PARAGRAPHS WHERE AT THE DEFENSE REQUEST I

10:21AM 19 BELIEVE PROBATION ACTUALLY INCLUDED SENTENCES THAT THE

10:21AM 20 DEFENDANT REQUESTED TO PROVIDE CONTEXT. SO I'LL OVERRULE THE

10:21AM 21 OBJECTION TO THAT MATERIAL.

10:21AM 22 OBJECTION SEVEN, THIS RELATES TO PARAGRAPHS 36 AND 37,

10:21AM 23 THAT IS OVERRULED. THE COURT FINDS THIS PARAGRAPH ACCURATE,

10:22AM 24 AND AGAIN, IT PROVIDES HELPFUL CONTEXT FOR THE OVERALL COMPANY

10:22AM 25 HISTORY AND SPECIFICALLY ITS RELATIONSHIP WITH PFIZER.

1 I'LL ALSO NOTE THAT PROBATION DID ADD LANGUAGE AT THE
2 DEFENSE REQUEST REGARDING HIS KNOWLEDGE OF THE PFIZER REPORT.

3 OBJECTION EIGHT AS TO PARAGRAPH 39 IS OVERRULED. THIS
4 PARAGRAPH DOES PROVIDE CONTEXT AND PROBATION DID, AS I
5 UNDERSTAND IT, REMOVE A SENTENCE AT THE DEFENSE REQUEST.

6 OBJECTION NINE AS TO PARAGRAPH 40 IS SUSTAINED IN PART,
7 AND THE COURT WILL STRIKE THE INTRODUCTORY CLAUSE IN THE
8 SENTENCE.

9 AND LET ME GET THAT FOR YOU, MS. GOLDSBERRY.

10 IT'S PROBABLY EASIER TO TELL YOU THAT THE SECOND SENTENCE
11 UP FROM THE BOTTOM THAT BEGINS WITH THE WORD "DESPITE."

12 PROBATION OFFICER: YES.

13 THE COURT: THAT WILL BE STRICKEN, THE WORD
14 "DESPITE" WILL BE STRICKEN AS WILL THE NEXT FOUR WORDS,
15 INCLUDING THE COMMA.

16 PROBATION OFFICER: OKAY. SO EVERYTHING UP UNTIL
17 THE COMMA?

18 THE COURT: INCLUDING THE COMMA. AND THE SENTENCE
19 WILL BEGIN WITH "HOLMES."

20 PROBATION OFFICER: GOT IT.

21 THE COURT: OBJECTION TEN, THIS OBJECTION IS
22 OVERRULED. THIS DESCRIPTION IS ACCURATE. IT DOES PROVIDE
23 RELEVANT TESTIMONY FROM A FORMER EMPLOYEE.

24 AND I'LL NOTE AGAIN AT THE DEFENSE REQUEST, THE PROBATION
25 INCLUDED SENTENCES IN REGARDS TO THE DEFENDANT'S, PARDON ME,

10:23AM 1 RELIANCE ON OPINIONS.

10:23AM 2 OBJECTION ELEVEN IS OVERRULED. THE COURT FINDS THAT THIS
10:24AM 3 PARAGRAPH IS ACCURATE AS WRITTEN, AND IT SEEMS THAT THE
10:24AM 4 DEFENDANT SEEKS TO ADD INFORMATION THAT ENCOMPASSES THE SPIRIT
10:24AM 5 OF PERHAPS A CLOSING ARGUMENT HERE, BUT THAT'S PART OF THE
10:24AM 6 RECORD, AND THE JURY HEARD THAT AND CONSIDERED ALL OF THAT. SO
10:24AM 7 THE OBJECTION IS OVERRULED.

10:24AM 8 TWELVE IS AN OBJECTION TO PSR PARAGRAPHS 25, 26, 35, 36,
10:24AM 9 37, 38, 39, 40, 41, 42, AND 44, AND THIS OBJECTION AS TO THOSE
10:24AM 10 PARAGRAPHS IS OVERRULED. I WILL NOTE THAT MANY OF THE
10:24AM 11 PARAGRAPHS ALSO CONTAIN STATEMENTS THAT WERE ADDED BY PROBATION
10:24AM 12 AT DEFENSE REQUEST INDICATING THAT MR. BALWANI'S POSITION AS TO
10:25AM 13 THOSE PARAGRAPHS AS WELL AS HIS DISAGREEMENT WITH THOSE
10:25AM 14 PARAGRAPHS WERE NOTED. SO THE COURT WILL OVERRULE THAT
10:25AM 15 OBJECTION.

10:25AM 16 LET'S SEE. I BELIEVE OBJECTION FOURTEEN, AND I'M AT
10:25AM 17 PARAGRAPH 47, IS OVERRULED. AND THIS DETAILS INVESTOR
10:25AM 18 MENDENHALL.

10:25AM 19 I'M NOT CERTAIN -- I WAS NOT ABLE TO DETERMINE WHAT THAT
10:25AM 20 OBJECTION REALLY ENTAILED, SO I'M GOING TO LEAVE IT AS IS.

10:26AM 21 MR. COOPERSMITH, I NOTE THE OBJECTION. I DON'T SEE HOW
10:26AM 22 IT'S INCOMPLETE OR MISLEADING, SO I'M GOING TO OVERRULE THE
10:26AM 23 OBJECTION AND LEAVE IT AS IT IS.

10:26AM 24 OBJECTION FIFTEEN RELATES TO PARAGRAPH 49, AND THE COURT
10:26AM 25 AGREES WITH THE PROBATION OFFICER'S RESPONSE TO THIS PARAGRAPH.

10:26AM 1 IT DOES NOT PURPORT TO TALLY THE NUMBER OF PATIENT VICTIMS. IT
10:26AM 2 ONLY STATES WITH ACCURACY THAT HUNDREDS OF PATIENTS PAID FOR
10:26AM 3 THE BLOOD TEST, IRRESPECTIVE OF WHETHER THEY PAID OUT OF POCKET
10:26AM 4 OR THROUGH AN INSURED. IT'S JUST A STATEMENT OF A FACT THAT
10:26AM 5 THE COURT WILL NOT DISTURB, AND THAT OBJECTION IS OVERRULED.

10:26AM 6 OBJECTION SIXTEEN RELATES TO PARAGRAPH 49 AND 50. AND THE
10:26AM 7 COURT OVERRULES THIS. THE COURT FINDS THAT THE EVIDENCE AT
10:26AM 8 TRIAL REVEALED MR. BALWANI'S KNOWLEDGE OF THE FACTS AS
10:27AM 9 INDICATED AND ADOPTS PROBATION'S EXPLANATION.

10:27AM 10 OBJECTION SEVENTEEN RELATED TO PARAGRAPH 52 IS OVERRULED.
10:27AM 11 THIS PARAGRAPH IS AN ACCURATE DESCRIPTION OF THE FACTS IN THE
10:27AM 12 CASE, AND THE COURT WILL OVERRULE THAT OBJECTION.

10:27AM 13 OBJECTION EIGHTEEN RELATES TO PARAGRAPH 53, PARDON ME,
10:27AM 14 THROUGH 58. THE COURT WILL OVERRULE THIS IN PART. PARAGRAPHS
10:27AM 15 53, 54, AND 58 REFLECT THE EXPERIENCE OF PATIENTS WHO DID
10:27AM 16 TESTIFY AT TRIAL, AND THEREFORE, THE OBJECTIONS TO THOSE
10:27AM 17 PATIENTS ARE OVERRULED.

10:27AM 18 NOW, AS TO THE REMAINING PATIENTS THAT ARE LISTED IN
10:28AM 19 THOSE -- IN THAT PARAGRAPH, THE COURT AGAIN WILL INVOKE FEDERAL
10:28AM 20 RULE OF CRIMINAL PROCEDURE 32(I) (3) (B) BECAUSE THE COURT WILL
10:28AM 21 NOT CONSIDER THOSE PATIENTS IN THE DEFENDANT'S SENTENCING.

10:28AM 22 OBJECTION NINETEEN RELATES TO PARAGRAPH 60. THE COURT
10:28AM 23 FINDS THAT THIS INFORMATION IS RELEVANT, IT PROVIDES CONTEXT,
10:28AM 24 AND THE COURT WILL OVERRULE THAT OBJECTION.

10:28AM 25 OBJECTION TWENTY RELATES TO PARAGRAPH 66 AND 67, AND

10:28AM 1 THOSE -- THAT OBJECTION IS OVERRULED. THE STATEMENTS, THE
10:28AM 2 COURT CONSIDERS THEM APPROPRIATE AS VICTIM IMPACT STATEMENTS.
10:28AM 3 THE COURT, OF COURSE THE PARTIES ARE AWARE, MAY CONSIDER THE
10:29AM 4 CONSPIRATORIAL CONDUCT WITHIN THE SCOPE OF THE CONSPIRACY, EVEN
10:29AM 5 IF THERE WASN'T PERSONAL OR INTERACTION WITH SPECIFIC INVESTORS
10:29AM 6 BY THE DEFENDANT.

10:29AM 7 OBJECTION TWENTY-ONE RELATES TO PARAGRAPH 61, AND THAT'S
10:29AM 8 OVERRULED. THE COURT FINDS THAT THE PROBATION OFFICER'S
10:29AM 9 EXPLANATION TO THIS OBJECTION IS APPROPRIATE.

10:29AM 10 OBJECTION TWENTY-FIVE IS OVERRULED. THIS RELATES TO
10:29AM 11 PARAGRAPH 14, AND THIS PARAGRAPH IS ACCURATE AND IS SUPPORTED
10:29AM 12 BY THE RECORD IN THE MATTER.

10:29AM 13 OBJECTION TWENTY-SIX RELATES TO PARAGRAPH 19, AND THIS IS
10:29AM 14 SUSTAINED IN PART. THE COURT WILL SUSTAIN IN PART THIS
10:29AM 15 OBJECTION.

10:30AM 16 THIS IS ON PAGE 8, MS. GOLDSBERRY, AND IT'S IN THE LAST
10:30AM 17 THREE SENTENCES OF THIS PARAGRAPH.

10:30AM 18 AND THE THIRD SENTENCE UP FROM THE BOTTOM AT THE END OF
10:30AM 19 THAT SENTENCE FOLLOWING THE WORD -- THE COURT WILL STRIKE THE
10:30AM 20 WORDS "REVIEW AND APPROVAL," AND IN PLACE OF THAT WILL INSERT
10:30AM 21 THE WORD "KNOWLEDGE."

10:31AM 22 DID YOU GET THAT?

10:31AM 23 PROBATION OFFICER: GOT IT.

10:31AM 24 THE COURT: OKAY. THANK YOU.

10:31AM 25 OBJECTION TWENTY-SEVEN IS OVERRULED. THIS LANGUAGE

1 ADEQUATELY REFLECTS DR. ROSENDORFF'S TESTIMONY AND THE
2 PARAGRAPH NOTES THAT THE DEFENSE DISAGREEMENT WITH THE
3 CHARACTERIZATION OF KNOWLEDGE. SO IT DOES CAPTURE THE DEFENSE
4 OPINIONS, SO I'LL OVERRULE THE OBJECTION.

5 OBJECTION TWENTY-EIGHT REFERS TO PARAGRAPH 37, AND THAT IS
6 OVERRULED. THE COURT FINDS THAT THIS PARAGRAPH, INCLUDING THE
7 LAST SENTENCE, IS ACCURATE AND DOES PROVIDE CONTEXT.

8 OBJECTION TWENTY-NINE IS -- RELATES TO PARAGRAPH 44, AND
9 THIS IS OVERRULED. THE COURT NOTES THAT THESE OBJECTIONS TO
10 THIS PARAGRAPH FOR THE SAME REASONS HE OBJECTS TO PARAGRAPH 40,
11 WHICH WAS OBJECTION NINE. THIS PARAGRAPH ACCURATELY SUMMARIZES
12 MS. PETERSON'S TESTIMONY AT TRIAL AND THE CONVICTIONS OF
13 MR. BALWANI REGARDING THE WIRE FRAUD AGAINST RDV CORPORATION,
14 WHICH WAS COUNT SEVEN. SO I'LL OVERRULE THAT OBJECTION.

15 OBJECTION THIRTY RELATES TO PARAGRAPH 50. THAT OBJECTION
16 IS OVERRULED. THIS PARAGRAPH IS SUPPORTED BY THE JURY'S
17 FINDINGS. THE COURT FINDS THAT IT IS ACCURATE.

18 OBJECTIONS THIRTY-ONE THROUGH THIRTY-TWO RELATE TO
19 PARAGRAPHS 55 AND 56, AND THE COURT WILL REFER, AS TO THESE
20 OBJECTIONS, REFER TO ITS DECISION IN OBJECTION EIGHTEEN, AND IT
21 IS VERY SIMILAR, AND THE COURT'S FINDING IN OBJECTION EIGHTEEN
22 WILL ALSO RELATE TO THESE OBJECTIONS.

23 OBJECTION THIRTY-THREE RELATES TO PARAGRAPH 57 OF THE PSR.
24 AND THE COURT WILL, AGAIN, CITE FEDERAL RULE OF CRIMINAL
25 PROCEDURE 32 (I) (3) (B). THE COURT WILL NOT CONSIDER THIS

1 INFORMATION AND THIS PARAGRAPH IN RELATION TO THE DEFENDANT'S
2 SENTENCING.

3 OBJECTION THIRTY-FOUR RELATES TO PARAGRAPH 59, AND THIS
4 INFORMATION THAT IS IN THIS PARAGRAPH IS ACCURATE, AND THE
5 LANGUAGE IN THIS PARAGRAPH INDICATES THAT THE DEFENDANT'S
6 CONCERNS WERE ADDRESSED BY PROBATION. THAT OBJECTION IS
7 OVERRULED.

8 OBJECTION THIRTY-FIVE RELATES TO PARAGRAPH 62, AND THE
9 COURT WILL PERHAPS SUSTAIN THIS IN PART. I BELIEVE THE DEFENSE
10 OBJECTS TO PARAGRAPH 62.

11 BUT, MR. COOPERSMITH, MY SENSE IS THAT YOU'RE -- YOU
12 INTEND TO INSERT THIS PROPOSED LANGUAGE PERHAPS AT THE END OF
13 PARAGRAPH 60, IN PARAGRAPH 60 BUT AT THE END.

14 WOULD THAT BE A BETTER PLACEMENT FOR THIS?

15 MR. COOPERSMITH: YOU MEAN IN PARAGRAPH 60 RATHER
16 THAN PARAGRAPH 62, YOUR HONOR?

17 THE COURT: YES.

18 YOUR SENTENCE BEGINS WITH "FOR COMPARISON," AND IT ENDS
19 WITH "TEST RESULTS," AND THAT LANGUAGE, I LOOKED AT THAT AND
20 THOUGHT IF THAT IS GOING TO BE APPROPRIATE, IT MIGHT BE MORE
21 APPROPRIATE TO ADD IT AT THE TAIL END OF 60. IT'S CONTEXTUAL
22 AND RELATES TO THAT SENTENCE.

23 MR. COOPERSMITH: YOUR HONOR, I GUESS I DON'T HAVE
24 VERY STRONG FEELINGS ABOUT IT, AS LONG AS IT'S IN.

25 BUT IT RELATES MORE TO PARAGRAPH 62 BECAUSE PARAGRAPH 60

10:34AM 1 RELATES TO THIS ARIZONA MATTER SEEMS LIKE A DIFFERENT ISSUE.
10:35AM 2 BUT EITHER WAY, AGAIN, YOUR HONOR, IT'S -- THE POINT WOULD
10:35AM 3 STILL BE IN THE PSR EITHER WAY.

10:35AM 4 THE COURT: WELL, I SUPPOSE THAT WAS THE CONFUSION
10:35AM 5 AS TO WHERE IT SHOULD GO.

10:35AM 6 LET'S ADD IT IN 60. IT SEEMS TO ME 60 IS ONLY TWO
10:35AM 7 SENTENCES NOW, AND IF YOU WOULD LIKE THIS TO HAVE SOME
10:35AM 8 RECOGNITION, PERHAPS IT'S BETTER PLACED THERE AND IT WON'T GET
10:35AM 9 LOST IN ALL OF THE LANGUAGE OF 62.

10:35AM 10 MR. COOPERSMITH: THAT'S FINE, YOUR HONOR.

10:35AM 11 THE COURT: SO THAT WILL BE INSERTED AT THE END, THE
10:35AM 12 END OF PARAGRAPH 60.

10:35AM 13 PROBATION OFFICER: AND THAT SENTENCE IS IN THE
10:35AM 14 APPENDIX, OBJECTION NUMBER THIRTY-FIVE DID THE COURT SAY?

10:35AM 15 THE COURT: LET'S SEE. I THINK THAT'S WHERE IT IS.

10:35AM 16 PROBATION OFFICER: OKAY.

10:35AM 17 (PAUSE IN PROCEEDINGS.)

10:36AM 18 THE COURT: THE FIRST SENTENCE IS WHAT I WAS
10:36AM 19 FOCUSED ON, NOT THE SECOND SENTENCE.

10:36AM 20 SO THAT FIRST SENTENCE THAT ENDS IN "RESULTS"?

10:36AM 21 PROBATION OFFICER: YES.

10:36AM 22 THE COURT: THAT WILL BE PLACED IN 60. THE SECOND
10:36AM 23 SENTENCE IS NOT NECESSARY.

10:36AM 24 PROBATION OFFICER: GOT IT.

10:36AM 25 THE COURT: AND OBJECTIONS THIRTY-SIX THROUGH

10:36AM 1 THIRTY-NINE ARE OVERRULED TO SAY THAT THE COURT WILL DISCUSS
10:36AM 2 THESE -- THIS IS PART OF OUR GUIDELINE DISCUSSION, SO I SUPPOSE
10:36AM 3 I COULD DEFER THOSE OBJECTIONS. THEY WILL BE, THEY WILL BE
10:37AM 4 TAKEN UP IN OUR CONVERSATION ABOUT GUIDELINE CALCULATIONS.

10:37AM 5 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:37AM 6 THE COURT: ALL RIGHT. ANY QUESTIONS?

10:37AM 7 MS. GOLDSBERRY, DID YOU GET EVERYTHING?

10:37AM 8 PROBATION OFFICER: I DID, YOUR HONOR.

10:37AM 9 THE COURT: ALL RIGHT. THANK YOU.

10:37AM 10 ALSO. LET ME MOVE NOW, IF I MAY, TO WHAT I'VE CALLED AND
10:37AM 11 CATEGORIZED THE SUBSTANTIVE OBJECTIONS.

10:37AM 12 LET'S START WITH OBJECTION THIRTEEN, WHICH IS THE INVESTOR
10:37AM 13 VICTIM COUNT. I BELIEVE IT'S PARAGRAPH 48 THAT THE DEFENSE
10:37AM 14 OBJECTS TO. IT RELATES TO THE INVESTOR COUNT.

10:37AM 15 I JUST WANTED TO SAY AS TO THIS PARAGRAPH, THE COURT WOULD
10:38AM 16 SUSTAIN THE OBJECTION IF THE OBJECTION IS INDICATING THAT THE
10:38AM 17 COURT SHOULD NOT ESTIMATE THE VICTIMS, AND I THINK THAT'S THE
10:38AM 18 IMPORT OF WHAT THIS OBJECTION IS.

10:38AM 19 THE DEFENDANT ASSERTS THAT THE COURT CANNOT ESTIMATE THE
10:38AM 20 NUMBER OF VICTIMS, AND THE COURT WILL NOT ESTIMATE THE NUMBER
10:38AM 21 OF VICTIMS, USING THE ENTIRE BODY OF THE C INVESTORS, NOR WILL
10:38AM 22 IT ANALYZE C1, C2 INVESTORS IN THE AGGREGATE.

10:38AM 23 THE COURT WILL CONSIDER THE EVIDENCE THAT IS PRESENTED AND
10:38AM 24 AVAILABLE FOR EACH INVESTOR VICTIM AND IDENTIFY THE VICTIMS AND
10:38AM 25 THOSE LOSS CALCULATIONS THAT FLOW FROM.

10:38AM 1 SO PERHAPS I'M TAKING TOO FINE A NOTE OF IT, BUT IF THE
10:38AM 2 OBJECTION WAS, JUDGE, YOU CAN'T ESTIMATE, I AGREE WITH THAT,
10:38AM 3 AND THE COURT DOESN'T INTEND TO ESTIMATE.

10:38AM 4 OBJECTION TWENTY-TWO IS THE LOSS CALCULATION AND
10:39AM 5 CAUSATION. EXCUSE ME. SO LET'S TALK ABOUT THAT.

10:39AM 6 THERE'S A NUMBER OF OBJECTIONS, DIFFERENT LEVEL OF
10:39AM 7 OBJECTIONS, I THINK, THAT THE DEFENSE IMPOSED HERE.

10:39AM 8 MR. COOPERSMITH: YES, YOUR HONOR.

10:39AM 9 AND MY COLLEAGUE, AMY WALSH, WILL SPEAK ON THE LOSS AMOUNT
10:39AM 10 ISSUES.

10:39AM 11 THE COURT: OKAY. WELL, THEN IT'S TIME FOR A
10:39AM 12 PITCHING CHANGE.

10:39AM 13 MR. COOPERSMITH: YES, YOUR HONOR.

10:39AM 14 THE COURT: GOOD MORNING, MS. WALSH.

10:39AM 15 MS. WALSH: GOOD MORNING, YOUR HONOR. NICE TO SEE
10:39AM 16 YOU AGAIN.

10:39AM 17 THE COURT: THANK YOU. LIKEWISE.

10:39AM 18 SO AS TO THE LOSS CALCULATION HERE, I NOTE THAT THE
10:39AM 19 DEFENDANT OBJECTS TO LISTING ANY VICTIM OR ANY LOSS ASSERTING
10:39AM 20 THAT NO VICTIM SUSTAINED ANY LOSS.

10:40AM 21 LET ME ASK YOU, DO YOU WANT TO MAKE A -- DO YOU WANT TO
10:40AM 22 PUT ANYTHING ON THE RECORD BEFORE I GO FORWARD HERE? WOULD YOU
10:40AM 23 LIKE ME TO HEAR SOMETHING?

10:40AM 24 MS. WALSH: YES, YES, PLEASE.

10:40AM 25 THE COURT: GO RIGHT AHEAD. PLEASE.

10:40AM 1 MS. WALSH: SO, YOUR HONOR, WHAT I HAD PLANNED TO
10:40AM 2 ADDRESS THE COURT ON TODAY WERE ALL OF THE ISSUES CONNECTED TO
10:40AM 3 OUR OBJECTIONS REGARDING LOSS, INCLUDING THE BURDEN OF PROOF,
10:40AM 4 THE NUMBER OF VICTIMS, CAUSATION, ET CETERA.

10:40AM 5 THE COURT: OKAY.

10:40AM 6 MS. WALSH: AND THE SABA REPORT.

10:40AM 7 THE COURT: SURE.

10:40AM 8 MS. WALSH: AND I'LL JUST RUN THROUGH THAT, AND
10:40AM 9 OBVIOUSLY IF THE COURT HAS QUESTIONS, I'LL ANSWER THAT.

10:40AM 10 THE COURT: SURE. OF COURSE.

10:40AM 11 MS. WALSH: SO LET'S START WITH THE BURDEN OF PROOF.
10:40AM 12 OBVIOUSLY THE COURT APPLIED IN MS. HOLMES'S SENTENCING THE
10:40AM 13 PREPONDERANCE BURDEN OR STANDARD OF PROOF, AND WE RESPECT THAT
10:40AM 14 RULING. WE DO DISAGREE WITH IT.

10:40AM 15 WE DO BELIEVE THAT THE CLEAR AND CONVINCING STANDARD
10:40AM 16 SHOULD APPLY HERE. WE THINK UNITED STATES VERSUS LONICH IS THE
10:41AM 17 OPERATIVE CASE THAT SHOULD APPLY TO THESE CIRCUMSTANCES.

10:41AM 18 AND THE ISSUE, OF COURSE, IS WHAT STANDARD OF PROOF SHOULD
10:41AM 19 APPLY TO THE GOVERNMENT WHO HAS THE BURDEN OF PROVING LOSS IN A
10:41AM 20 FRAUD CASE.

10:41AM 21 THE TWO FACTORS THAT REALLY ANIMATED THE COURT'S OPINION
10:41AM 22 IN LONICH, WHICH WAS A 2822 CASE, AS YOU KNOW, WERE, FIRST,
10:41AM 23 WHETHER THE DISPUTED ENHANCEMENTS DRAMATICALLY INCREASED THE
10:41AM 24 LOSS AMOUNT OR THE LEVELS, THE OFFENSE LEVEL THAT APPLIED.

10:41AM 25 AND THE COURT IN LONICH APPLIED THE VALENCIA FACTORS FIVE

1 AND SIX AND THAT IS IF THE ENHANCEMENT WAS 4 OR MORE LEVELS
2 ABOVE WHAT IT OTHERWISE WOULD BE, AND THE OFFENSE LEVEL
3 PROVIDED FOR A DOUBLING OF THE SENTENCING RANGE, THEN THAT WAS
4 ONE -- TWO FACTORS THAT WEIGHED HEAVILY IN FAVOR OF APPLYING
5 THE CLEAR AND CONVINCING STANDARD OF PROOF.

6 THERE'S NO DISPUTE HERE THAT THOSE TWO FACTORS ARE MET.
7 WHAT THE GOVERNMENT PROPOSES IN ITS LOSS CALCULATION
8 DRAMATICALLY INCREASES THE OFFENSE LEVEL.

9 WHAT THE PSR ALSO RECOMMENDS DOES THE SAME. AND EVEN IF
10 YOU TAKE THE COURT'S FINDINGS IN THE HOLMES CASE, IT STILL
11 DRAMATICALLY INCREASES THE OFFENSE LEVELS BY THE LEVELS OF
12 LOSS.

13 THE GOVERNMENT WOULD BE 30 LEVELS. THE COURT'S
14 APPLICATION WAS 24 LEVELS. AND IF YOU TAKE MR. SABA'S PROPOSED
15 LOSS, THAT'S AN ADJUSTMENT OF 26 OR 28 LEVELS.

16 SO I DON'T THINK THERE'S ANY QUESTION THAT ANY PROPOSED
17 LOSS CALCULATION, AT LEAST WHAT WE HAVE HEARD SO FAR IN THE
18 HOLMES CASE AND IN OUR CASE, DRAMATICALLY INCREASES THE
19 DISCLOSURE.

20 THE SECOND FACTOR THAT THE LONICH COURT FOCUSSED ON WAS
21 WHETHER THE INCREASE WAS BASED ON THE EXTENT OF THE CONSPIRACY.
22 AND, OF COURSE, THIS IS AN EXTREMELY -- IT CAN BE A DIFFICULT
23 FACT TO ASCERTAIN.

24 THE LONICH COURT ITSELF RECOGNIZED THAT IN CONSPIRACY
25 CASES, THERE CAN BE THESE BORDERLINE CASES WHERE THE LOSS

10:43AM 1 AMOUNT DOES NOT FALL WITHIN THE CONSPIRACY.

10:43AM 2 AND WHAT WAS IMPORTANT TO THE COURT AND REALLY DROVE THE
10:43AM 3 COURT'S OPINION WAS WHETHER THE DEFENDANT HAD THE OPPORTUNITY
10:43AM 4 TO CHALLENGE THE LOSS AMOUNT THAT WAS BEING APPLIED AND
10:43AM 5 CHALLENGE THE EVIDENCE SUPPORTING THAT LOSS AMOUNT, AND THE
10:43AM 6 COURT REALLY FOCUSSED ON THE DUE PROCESS CONCERNS THAT WERE AT
10:44AM 7 PLAY IN LONICH, YOU KNOW, THE FAILURE OF THE BANK WAS BEING
10:44AM 8 PEGGED AS THE LOSS AMOUNT AND WHAT THE GOVERNMENT WAS
10:44AM 9 PROPOSING, AND THERE WERE REAL DUE PROCESS CONCERNS BECAUSE THE
10:44AM 10 DEFENDANTS NEVER REALLY GOT TO CHALLENGE THAT AMOUNT.

10:44AM 11 AND SO HERE WE HAVE A SIMILAR SITUATION.

10:44AM 12 THOSE DUE PROCESS CONCERNS THAT WERE AT PLAY IN LONICH
10:44AM 13 APPLY HERE AND REQUIRE A HIGHER BURDEN OF PROOF.

10:44AM 14 NONE OF THE FACTS UNDERLINE THE LOSS AMOUNT HERE AND
10:44AM 15 REALLY CAUSATION OF THE LOSS WERE PRESENTED TO THE JURY.

10:44AM 16 THE JURY WAS NOT INSTRUCTED ON RELIANCE. THERE WERE TIMES
10:44AM 17 WHEN TO THE EXTENT THAT THE DEFENSE WANTED TO ASK QUESTIONS
10:44AM 18 ABOUT RELIANCE OR GET INTO RELIANCE, THE GOVERNMENT OBJECTED TO
10:44AM 19 THOSE QUESTIONS, UNDERSTANDABLY BECAUSE RELIANCE IS NOT AN
10:44AM 20 ELEMENT, BUT NEVERTHELESS THE JURY DID NOT HEAR THAT EVIDENCE.

10:45AM 21 THE JURY CAME BACK WITH A GENERAL VERDICT, MAKING NO
10:45AM 22 FINDINGS WHATSOEVER ON CAUSATION OR RELIANCE OR LOSS.

10:45AM 23 AND IN THE CIRCUMSTANCES OF THIS CASE, I RECOGNIZE THAT
10:45AM 24 THERE ARE SOME CASES WHERE, GIVEN THE NATURE OF THE CONSPIRACY,
10:45AM 25 IT'S EASY TO FIGURE OUT WHETHER THE CONDUCT FALLS WITHIN THE

1 SCOPE OF THE CONSPIRACY AND THE LOSS CAN JUST BE CALCULATED.

2 IN THIS CASE IT'S JUST NOT SO. IT'S A VERY COMPLICATED
3 CAUSATION AND LOSS METHODOLOGY THAT NEEDS TO BE APPLIED OR THAT
4 HAS BEEN APPLIED BY VARIOUS EXPERTS. IT'S NOT -- IT WAS NOT A
5 SHAM COMPANY. THERANOS WAS A REAL COMPANY. IT WASN'T A PONZI
6 SCHEME, WHICH MAY MAKE IT EASIER TO FIGURE OUT LOSS.

7 IT REALLY -- WHAT THESE INVESTORS AND OTHER INVESTORS THAT
8 THE GOVERNMENT WANTS TO INCLUDE RELIED ON IN MAKING THEIR
9 DECISIONS TO INVEST IS A SERIOUS QUESTION, AND IT'S A QUESTION
10 THAT YIELDS MANY, MANY YEARS OF EXPOSURE AND POTENTIALLY TIME
11 IN JAIL AND BECAUSE OF THAT, WE BELIEVE THAT THE CLEAR AND
12 CONVINCING STANDARD SHOULD APPLY.

13 SO, YOUR HONOR, I WAS GOING TO MOVE ON TO THE GOVERNMENT'S
14 LOSS AMOUNT.

15 THE COURT: YES.

16 MS. WALSH: SO THE GOVERNMENT IS ADVOCATING FOR AN
17 \$800 MILLION LOSS AMOUNT ROUGHLY, AND IT HAS NOT PROVEN
18 CAUSATION FOR THAT AMOUNT.

19 IT DOES NOT PROVE CAUSATION FOR THE LONG LIST OF VICTIMS
20 THAT IT PROVIDED TO THE COURT. IT DOES NOT -- IT HAS NOT
21 PROVEN, EITHER BY CLEAR AND CONVINCING EVIDENCE OR BY A
22 PREPONDERANCE THAT EACH ONE OF THOSE VICTIMS INDIVIDUALLY
23 RELIED ON THE REPRESENTATIONS THAT WERE BEFORE THE JURY IN THIS
24 CASE IN MAKING THEIR DECISIONS ABOUT WHETHER TO INVEST, AND I'M
25 GOING TO COME BACK TO THAT IN A SECOND.

10:47AM 1 BUT ANOTHER REASON THAT THE GOVERNMENT'S PROPOSED LOSS
10:47AM 2 AMOUNT FAILS IS THAT WE HAVE A SERIES OF EVENTS THAT ARE
10:47AM 3 INTERVENING CAUSES THAT BREAK THE CAUSAL CHAIN AFTER
10:47AM 4 MR. BALWANI LEAVES THERANOS.

10:47AM 5 AND I'M GOING TO ADDRESS THAT SEPARATELY, BUT THAT IS THE
10:47AM 6 SECOND REASON. MR. BALWANI IS IN A VERY DIFFERENT SITUATION
10:47AM 7 FROM MS. HOLMES. HE LEFT THERANOS IN MAY OF 2016. SO I WILL
10:47AM 8 COME BACK TO THAT LATER.

10:47AM 9 BUT THE FINAL REASON THAT THE GOVERNMENT'S LOSS AMOUNT
10:47AM 10 FAILS IS THAT THE GOVERNMENT DOES NOT DISENTANGLE AS THE COURT
10:47AM 11 POINTED OUT IN MS. HOLMES'S SENTENCING. THE GOVERNMENT DOES
10:48AM 12 NOT DISENTANGLE THE VALUE OF THERANOS FROM THE PRICE THAT
10:48AM 13 INVESTORS PAID FOR STOCK IN THERANOS, AND THEY HAVE TO DO THAT
10:48AM 14 UNDER ZOLP.

10:48AM 15 THE GOVERNMENT TRIED TO DO IT WITH THE SABA REPORT, BUT AS
10:48AM 16 I'M GOING TO GO THROUGH, THAT REPORT, AND AS EVIDENCED BY THE
10:48AM 17 EXPERT REPORTS THAT WE SUBMITTED, HAS SERIOUS ERRORS THAT CALL
10:48AM 18 INTO QUESTION THE RELIABILITY OF MR. SABA'S ANALYSIS, SO I WANT
10:48AM 19 TO GO THROUGH EACH ONE OF THOSE.

10:48AM 20 THE COURT: OKAY.

10:48AM 21 MS. WALSH: SO ON THE RELIANCE ISSUE, THE GOVERNMENT
10:48AM 22 HAS NOT PROVEN THAT EACH OF THE PROPOSED VICTIMS RELIED ON THE
10:48AM 23 STATEMENTS THAT WERE THE SUBJECT OF THE TRIAL.

10:48AM 24 THERANOS HAD MANY, MANY INVESTORS. THOSE INVESTORS
10:48AM 25 INVESTED IN THERANOS FOR MANY DIFFERENT REASONS, VARIOUS

1 REASONS. SOME MAY HAVE INVESTED BECAUSE THEY THOUGHT
2 ELIZABETH HOLMES WAS BRILLIANT AND WAS A DYNAMIC LEADER AND
3 BELIEVED IN HER MISSION. OTHERS MAY HAVE INVESTED BECAUSE
4 EVERYONE ELSE WAS INVESTING AND THEY HAD THIS FEAR OF MISSING
5 OUT ON A GREAT OPPORTUNITY.

6 AND, IN FACT, YOUR HONOR CITED A SIMILAR TYPE OF INVESTOR
7 IN MS. HOLMES'S SENTENCING, AND I THINK IT WAS MS. FADIL WHO
8 INVESTED BECAUSE SHE NOTICED SOME BIG NAMES INVESTING. AND THE
9 COURT RIGHTLY POINTED OUT THAT THERE HAS TO BE SOME RELIANCE BY
10 A PARTICULAR INVESTOR ON THE STATEMENTS THAT WERE AT ISSUE IN
11 THE TRIAL.

12 THE VERDICT ALONE, SINCE IT WAS A GENERAL VERDICT, CANNOT
13 ESTABLISH THAT RELIANCE AND NEITHER THE GOVERNMENT NOR THE PSR
14 PROVIDES SUFFICIENT EVIDENCE FROM WHICH THE COURT CAN
15 REASONABLY CONCLUDE THAT EACH ONE OF THESE DIFFERENT VICTIMS
16 RELIED ON THE MISREPRESENTATIONS, AND, THEREFORE, THEIR LOSSES
17 WERE CAUSED BY THEM.

18 AND I WANT TO TALK ABOUT ONE VERY GLARING EXAMPLE, AND
19 THIS IS ONE OF THE INVESTORS THAT YOUR HONOR INCLUDED IN THE
20 TEN THAT APPLIED DURING MS. HOLMES'S SENTENCING, AND THAT
21 INVESTOR IS RUPERT MURDOCH.

22 SO MR. MURDOCH INVESTED \$125 MILLION IN FEBRUARY 2015.
23 THE GOVERNMENT NEVER INTERVIEWED MR. MURDOCH ABOUT WHAT HE
24 RELIED ON, AND HE DID NOT SUBMIT A VICTIM IMPACT STATEMENT. SO
25 WE DON'T KNOW WHY HE INVESTED IN THERANOS.

1 HE MAY HAVE BEEN LIKE MS. FADIL AND INVESTED IN THERANOS
2 BECAUSE EVERYONE ELSE WAS, WE JUST DON'T KNOW.

3 WHAT WE DO KNOW IS FROM HIS CHIEF OF STAFF,
4 NATALIE RAVITZ, WHO TESTIFIED IN FRONT OF THE S.E.C., AND WHAT
5 SHE SAID UNDER OATH IN FRONT OF THE S.E.C. IS THAT SHE
6 UNDERSTOOD THAT THERANOS'S HISTORICAL REVENUES WERE LOW. SHE
7 WAS SKEPTICAL ABOUT THE INVESTMENT FOR THAT REASON. SHE
8 DESCRIBED HOW MS. HOLMES TOLD HER THAT THE DEVICE, THE THERANOS
9 DEVICE COULD BE USED IN MILITARY FIELD OPERATIONS AND ON
10 MEDEVAC HELICOPTERS, BUT SHE DIDN'T SAY THEY WERE ON THE
11 HELICOPTERS OR THEY WERE IN THE FIELD, JUST THAT THEY COULD BE.

12 AND IMPORTANTLY, MS. RAVITZ TESTIFIED IN THE S.E.C. THAT
13 SHE ACTUALLY DIDN'T DO THE WORK THAT SHE WOULD NORMALLY DO, THE
14 DUE DILIGENCE OR EXAMINING THE BINDER THAT WAS RECEIVED FROM
15 THERANOS BECAUSE MR. MURDOCH HAD ALREADY AGREED TO INVEST IN
16 THERANOS BEFORE SHE GOT A CHANCE TO DO IT. HE ALREADY HAD AN
17 ORAL AGREEMENT WITH MS. HOLMES TO INVEST.

18 SO THIS IS THE CLEAREST EXAMPLE OF WE HAVE NO IDEA WHY
19 RUPERT MURDOCH INVESTED IN THERANOS, AND BECAUSE OF THAT THE
20 GOVERNMENT HAS NOT MET ITS BURDEN OF PROOF ON CAUSATION.

21 ANOTHER INVESTOR THAT FALLS INTO THAT SAME CATEGORY IS
22 PEER VENTURES. PEER VENTURES -- THE REPRESENTATIVES OF
23 PEER VENTURES WERE INTERVIEWED, THEY GAVE STATEMENTS ABOUT WHAT
24 STATEMENTS WERE MADE TO THEM ABOUT THERANOS, BUT THERE'S
25 NOTHING ABOUT WHAT THEY ACTUALLY RELIED ON AND WHY THEY

1 INVESTED, AND THAT ABSENCE OF EVIDENCE MEANS THAT WE CANNOT PUT
2 THEM IN THE CATEGORY OF A VICTIM WHOSE LOSSES WERE CAUSED BY
3 THE MISREPRESENTATIONS.

4 OKAY. WHAT THE GOVERNMENT ALSO OFFERS TO THE COURT, AND
5 THE COURT USED THIS DURING MS. HOLMES'S TESTIMONY, IS AN EXPERT
6 REPORT THAT WOULD ESTABLISH LOSS UNDER ZOLP BY ESTABLISHING
7 ALSO THE VALUE OF THERANOS AT VARIOUS DIFFERENT DATES. AND THE
8 COURT, I KNOW, RELIED ON THAT REPORT DURING THE HOLMES'S
9 SENTENCING, BUT AS EVIDENCED BY THE EXPERT REPORTS THAT WE
10 SUBMITTED, THE SABA REPORT IS NOT RELIABLE, AND IT'S NOT
11 RELIABLE FOR SEVERAL DIFFERENT REASONS.

12 ONE, IS ON ITS OWN IT PROVIDES A RANGE OF INVESTOR LOSSES,
13 AND THAT RANGE IS 237 MILLION TO 316 MILLION, WHICH IS AN
14 \$80 MILLION RANGE. THAT RANGE IS FAR TOO BROAD FOR THE COURT
15 TO BE ABLE TO RELY ON IT AS CONSTITUTING A REASONABLE ESTIMATE
16 OF LOSS.

17 AND I THINK THE COURT RECOGNIZED THAT IN THE HOLMES
18 SENTENCING, SO WE WOULD JUST REITERATE THAT ARGUMENT HERE. THE
19 SAME THING APPLIES HERE. IT'S TOO BROAD A RANGE, AND THE COURT
20 CANNOT USE IT.

21 THE SECOND ISSUE IS THAT EACH OF THE TWO APPROACHES USED
22 BY MR. SABA CONTAINS SERIOUS FLAWS, BOTH THE INCOME APPROACH
23 AND THE ASSET APPROACH.

24 SINCE THE COURT RELIED ON THE INCOME APPROACH, I WANT TO
25 ADDRESS THAT FIRST.

10:54AM 1 SO THE FLAW IN MR. SABA'S INCOME APPROACH RELATES TO THE
10:54AM 2 DISCOUNT RATE THAT HE APPLIED TO ASCERTAIN THE PRESENT VALUE OF
10:55AM 3 THE CASH FLOWS. AND THIS IS ALL LAID OUT IN MR. WEINGUST'S
10:55AM 4 DECLARATION. AND THE DISCOUNT RATE MATTERS BECAUSE IT'S WHAT
10:55AM 5 IS USED TO REDUCE FUTURE CASH FLOWS TO PRESENT VALUE.

10:55AM 6 USING A HIGHER DISCOUNT RATE MEANS THE PRESENT VALUE WILL
10:55AM 7 BE LOWER. AND WHAT MR. WEINGUST POINTS OUT IS THAT MR. SABA'S
10:55AM 8 RATE IS INAPPROPRIATELY HIGH. SO WHY IS THAT?

10:55AM 9 ACCORDING TO MR. WEINGUST, MR. SABA RELIED ON OLD DATA IN
10:55AM 10 REACHING THAT 44 PERCENT DISCOUNT RATE, AND WHAT HE SHOULD HAVE
10:55AM 11 DONE IS USED THE DATA THAT EXISTED CLOSER IN TIME TO THE
10:55AM 12 VALUATION DATE, WHICH WAS DECEMBER 31ST, 2014, THE DATE THAT
10:55AM 13 THE COURT CHOSE.

10:55AM 14 NOW, WHEN YOU USE THAT DISCOUNT RATE, WHEN YOU USE THE
10:56AM 15 DATA THAT IS CLOSER IN TIME, YOU COME UP WITH YOUR DISCOUNT
10:56AM 16 RATE, IT GOES DOWN TO 27 PERCENT, AND THIS IS ALL LAID OUT IN
10:56AM 17 THE WEINGUST DECLARATION.

10:56AM 18 THE COURT: DID HE TALK ABOUT THE -- HIS CRITICISM,
10:56AM 19 I THINK, WAS ABOUT THE USE OF THE PEPPERDINE STUDY. HE TALKED
10:56AM 20 ABOUT THE PEPPERDINE STUDY.

10:56AM 21 MS. WALSH: HE DID.

10:56AM 22 THE COURT: AND I THINK HE WAS CRITICAL SAYING THAT
10:56AM 23 MR. SABA DID NOT PROPERLY USE THAT PEPPERDINE STUDY IN THE
10:56AM 24 SENSE THAT -- I THINK -- DIDN'T HE SAY THAT THE INFORMATION IN
10:56AM 25 THAT STUDY WAS SOMEHOW DATED AND HE SHOULD HAVE DONE MORE?

10:56AM 1 MS. WALSH: RIGHT. SO PEPPERDINE CREATES THE STUDY
10:56AM 2 EVERY YEAR AND INSTEAD OF USING THE YEAR THAT WAS CLOSE IN TIME
10:56AM 3 TO THE VALUATION DATE, MR. SABA INCLUDED MANY, MANY YEARS GOING
10:56AM 4 BACK PRETTY FAR IN TIME, AND MR. WEINGUST SAYS THAT'S NOT AN
10:56AM 5 APPROPRIATE WAY TO CALCULATE THE DISCOUNT RATE. YOU SHOULD USE
10:57AM 6 THE DATA THAT EXISTS AS CLOSE IN TIME AS POSSIBLE TO THE
10:57AM 7 VALUATION DATE.

10:57AM 8 THE COURT: AND THERE WAS ALSO SOME DISCUSSION IN
10:57AM 9 BOTH OF THE REPORTS ABOUT THE VARIABILITY OF VC CONDUCT. VC'S
10:57AM 10 INVEST IN VERY STRANGE WAYS. IT'S NOT A 3 PERCENT GUARANTEED
10:57AM 11 RETURN, IT'S NOT A TREASURY BILL.

10:57AM 12 MS. WALSH: NO.

10:57AM 13 THE COURT: IT'S A CREATURE OF THEIR OWN DESIGN AND
10:57AM 14 ACTIONS, AND, THEREFORE, I THINK THEY BOTH OBSERVED THAT VC
10:57AM 15 INVESTMENTS ARE DIFFICULT TO TRACK.

10:57AM 16 MS. WALSH: THEY ARE DIFFICULT -- WELL, PEPPERDINE
10:57AM 17 IS A STUDY THAT TRACKS THEM EVERY YEAR. SO THAT IS THE DATA
10:57AM 18 THAT EXISTS.

10:57AM 19 THE COURT: COLLECTS THOSE INVESTMENTS AND OFFERS
10:57AM 20 THAT HISTORY?

10:57AM 21 MS. WALSH: RIGHT. BUT JUST SINCE YOU RAISED IT,
10:57AM 22 YOUR HONOR, VC INVESTMENTS OR I GUESS PROJECTIONS OR RATES OF
10:58AM 23 RETURN THAT APPEAR THERE, THEY ACCOUNT FOR THE RISK THAT THEY
10:58AM 24 KNOW THEY'RE GETTING INTO. AND THERE ARE PARTS, AND I THINK
10:58AM 25 MR. WEINGUST POINTED THIS OUT, THERE ARE PARTS OF MR. SABA'S --

10:58AM 1 I THINK IT'S MORE IN THE SUPPLEMENTAL DECLARATION WHERE
10:58AM 2 MR. SABA SAYS, YOU KNOW, THESE RATES ARE TOO OPTIMISTIC, AND
10:58AM 3 THEY DON'T ACCOUNT FOR THE RISK THAT EXISTED AT THERANOS.

10:58AM 4 WELL, THESE ARE VENTURE CAPITAL FIRMS. THEY ACCOUNT FOR
10:58AM 5 RISK. THIS IS A MARKET FULL OF RISK. SO THAT IS ANOTHER ONE
10:58AM 6 OF MR. WEINGUST'S POINTS THAT MR. SABA IS KIND OF AFTER THE
10:58AM 7 FACT SAYING THAT THESE RATES ARE TOO OPTIMISTIC BECAUSE THEY
10:58AM 8 HAVEN'T ACCOUNTED FOR RISK, BUT THEY HAVE. THAT'S WHAT THEY
10:58AM 9 DO.

10:58AM 10 THE COURT: THANK YOU. YOU KNOW, WHAT WAS
10:58AM 11 INTERESTING, AS I LOOKED AT THESE REPORTS AND THINGS, I DIDN'T
10:58AM 12 LOOK AT AN APPENDIX OF THE PEPPERDINE REPORT OR ANY OF THESE
10:59AM 13 OTHER REPORTS, AND WHEN THEY TALK ABOUT RISK, AND THAT'S WHAT
10:59AM 14 WE'RE TALKING ABOUT FOR THIS ANALYSIS, WAS THERE ANY SPECIFIC
10:59AM 15 FACTOR THAT WAS IDENTIFIED IN THE RISK TAKING FOR THE RISK OF
10:59AM 16 FRAUD IN AN INVESTMENT?

10:59AM 17 IT DIDN'T SEEM THAT THAT'S A COLUMN THAT IS CHECKED OFF,
10:59AM 18 TICKED BY A PEPPERDINE STUDY OR SOMEONE ELSE. IT SAYS RISK,
10:59AM 19 AND I SUPPOSE FROM AN INVESTOR STANDPOINT, I DON'T KNOW, BUT
10:59AM 20 DOES THAT MEAN, WELL, YOU KNOW, COMPANIES FAIL. SOMEONE
10:59AM 21 INVENTS A NEW MOUSETRAP AND IT MIGHT WORK, BUT IT MIGHT NOT AS
10:59AM 22 OPPOSED TO IS THERE A RISK THAT THIS IS A FRAUDULENT ENDEAVOR?

10:59AM 23 MS. WALSH: SO WHEN WE'RE TALKING ABOUT ECONOMIC
10:59AM 24 RISK AND VALUATION, FIRST, VALUATION IS DONE ONLY BASED ON WHAT
10:59AM 25 IS KNOWN OR KNOWABLE, RIGHT?

10:59AM 1 SO TYPICALLY IF THERE IS A FRAUD, IT'S NOT KNOWN

11:00AM 2 TYPICALLY.

11:00AM 3 THE COURT: NO ONE WOULD INVEST IN THAT, WOULD THEY?

11:00AM 4 MS. WALSH: RIGHT. BUT THIS IS ALSO AN ECONOMIC

11:00AM 5 ANALYSIS, AND WHETHER -- IT'S ABOUT LOSING YOUR MONEY. SO

11:00AM 6 WHETHER YOU LOSE YOUR MONEY BECAUSE THE COMPANY FAILED OR

11:00AM 7 BECAUSE IT -- FRAUD IS AFOOT, AND THE FRAUD COMES OUT AND YOU

11:00AM 8 LOSE YOUR INVESTMENT, FROM AN ECONOMIC STANDPOINT, THOSE TWO

11:00AM 9 THINGS ARE NOT GOING TO BE DIFFERENT. YOU'RE GOING TO LOSE

11:00AM 10 YOUR MONEY.

11:00AM 11 SO TO ANSWER YOUR QUESTION, I DON'T THINK THOSE -- THE

11:00AM 12 PEPPERDINE STUDY ACCOUNTED FOR FRAUD, BUT I'M NOT SURE IT

11:00AM 13 MATTERS.

11:00AM 14 THE ISSUE IS WHAT IS THE RISK THAT YOU ARE GOING TO LOSE

11:00AM 15 YOUR INVESTMENT.

11:00AM 16 OKAY. SO MR. WEINGUST, WHEN HE APPLIES THE DATA THAT HE

11:00AM 17 THINKS IS APPROPRIATE, COMES UP WITH A MUCH LOWER DISCOUNT

11:01AM 18 RATE, AND IT'S A 27 PERCENT DISCOUNT RATE. AND HE LAYS THAT

11:01AM 19 OUT IN HIS TABLE 2 TO HIS DECLARATION.

11:01AM 20 AND MR. WEINGUST IS NOT JUST PICKING THIS OUT OF THIN AIR.

11:01AM 21 HE BASES IT ON DATA THAT EXISTS AT THE TIME OF THE VALUATION

11:01AM 22 DATE, BUT IT'S ALSO CORROBORATED BY OTHER EVIDENCE IN THE CASE.

11:01AM 23 FOR EXAMPLE, ARANCA USED A DISCOUNT RATE ON DECEMBER 31ST,

11:01AM 24 2014 THAT WAS 20 PERCENT, MUCH CLOSER TO MR. WEINGUST AND MUCH,

11:01AM 25 MUCH LOWER THAN MR. SOLACE. AND THE LONG FILING THAT YOU

11:01AM 1 REFERENCED THIS MORNING, YOUR HONOR, I THINK IT WAS SO LONG
11:01AM 2 BECAUSE MR. WEINGUST ATTACHED THAT ARANCA REPORT.

11:01AM 3 THE COURT: I THINK HIS SUMMARY, WAS IT 14 PAGES OR
11:01AM 4 SOMETHING LIKE THAT?

11:01AM 5 MS. WALSH: YEAH, RIGHT.

11:01AM 6 THE COURT: RIGHT. BUT OF COURSE HE WANTED ME TO
11:02AM 7 READ THOSE 14 PAGES TO GET CONTEXT OF HIS 14 PAGES I THINK.

11:02AM 8 MS. WALSH: WELL, I THINK HE JUST WANTED TO GIVE YOU
11:02AM 9 THE BASIS FOR WHAT HE WAS SAYING.

11:02AM 10 SO THAT ARANCA REPORT DOES CONTAIN THE DISCOUNT RATE AND
11:02AM 11 ITS DISCOUNT RATE IS 20 PERCENT.

11:02AM 12 ANOTHER CORROBORATING FACT IS FORTRESS IN 2017, LATE IN
11:02AM 13 2017 WHEN "THE WALL STREET JOURNAL" HAS WRITTEN ALL OF ITS
11:02AM 14 ARTICLES ABOUT THERANOS AND THE FRAUD IS POTENTIALLY OUT IN THE
11:02AM 15 MARKETPLACE, VERY RISKY INVESTMENT FOR ARANCA -- I'M SORRY, FOR
11:02AM 16 FORTRESS, AND FORTRESS ASSIGNED A DISCOUNT RATE OF 25 PERCENT,
11:02AM 17 A RATE OF RETURN OF 25 PERCENT, ALSO MUCH CLOSER TO
11:02AM 18 MR. WEINGUST AND MUCH LOWER THAN MR. SABA.

11:02AM 19 FINALLY, RDV IN ONE OF ITS EXHIBITS THAT IS A TRIAL
11:02AM 20 EXHIBIT, AND THIS IS TRIAL EXHIBIT 2192, ASSIGNED A RATE OF
11:03AM 21 RETURN FOR THERANOS OF 30 PERCENT.

11:03AM 22 SO MR. WEINGUST'S AFTER-THE-FACT ANALYSIS IS ACTUALLY
11:03AM 23 CORROBORATED BY SEVERAL PIECES OF EVIDENCE IN THE CASE. AND
11:03AM 24 WHAT IT SHOWS IS MR. SABA'S DISCOUNT RATE IS TOO HIGH AND
11:03AM 25 CORRECTING IT MAKES A HUGE DIFFERENCE IN THE AMOUNT OF VALUE

11:03AM 1 THAT EXISTED IN THERANOS ON THAT VALUATION DATE, A HUGE
11:03AM 2 DIFFERENCE, AND THOSE DIFFERENCES ARE LAID OUT IN
11:03AM 3 MR. WEINGUST'S TABLE 2.

11:03AM 4 MR. WEINGUST ALSO FOUND THAT MR. SABA'S ASSET APPROACH WAS
11:03AM 5 FLAWED.

11:03AM 6 AND SINCE THE COURT DIDN'T APPLY THE ASSET APPROACH, I'D
11:03AM 7 LIKE TO GO THROUGH IT, BUT I RECOGNIZE THAT IT WASN'T APPLIED
11:03AM 8 TO MS. HOLMES.

11:04AM 9 BUT JUST QUICKLY, MR. WEINGUST NOTICED THAT MR. SABA DID
11:04AM 10 NOT APPLY AN OPPORTUNITY COST, WHICH IS A STANDARD FACTOR THAT
11:04AM 11 IS APPLIED IN ASSESSING VALUE USING THIS ASSET APPROACH. AND
11:04AM 12 MR. SABA APPEARS TO HAVE IGNORED THAT FACTOR. I DON'T KNOW IF
11:04AM 13 HE FORGOT TO APPLY IT OR WHY HE DIDN'T MENTION IT.

11:04AM 14 HE SAYS IN HIS SUPPLEMENTAL DECLARATION THAT HE DID
11:04AM 15 CONSIDER IT, BUT HE DECIDED NOT TO APPLY IT.

11:04AM 16 I THINK -- I'M NOT QUITE SURE THAT IS CREDIBLE BECAUSE
11:04AM 17 THERE WERE OTHER THINGS IN HIS ORIGINAL REPORT THAT HE
11:04AM 18 CONSIDERED AND DECIDED NOT TO APPLY, AND HE GOES THROUGH THEM
11:04AM 19 VERY CAREFULLY. SO IT SEEMS HE WOULD DO THE SAME THING WITH
11:04AM 20 OPPORTUNITY CAUSED IF HE HAD REALLY CONSIDERED IT. BUT IN ANY
11:04AM 21 EVENT, IT SHOULD BE APPLIED ACCORDING TO MR. WEINGUST, AND THAT
11:04AM 22 ALSO GREATLY AFFECTS THE VALUE OF THERANOS.

11:05AM 23 FINALLY, THE ALLOCATION METHOD THAT MR. SABA USES, SO THIS
11:05AM 24 IS WHEN HE HAS THE ENTIRE VALUE AND HE NEEDS TO ALLOCATE IT TO
11:05AM 25 THE DIFFERENT SHAREHOLDERS BASED ON THEIR LEVELS WITHIN THE

11:05AM 1 COMPANY, HE USED AN ALLOCATION METHOD THAT IS ACCEPTED IN THE
11:05AM 2 INDUSTRY, BUT IT'S THE OPC METHOD, BUT THERE ARE TWO INPUTS
11:05AM 3 THAT GO INTO THAT METHOD THAT ARE EXTREMELY SPECULATIVE.

11:05AM 4 THE TWO INPUTS ARE VOLATILITY AND THE OCCURRENCE OF A
11:05AM 5 HYPOTHETICAL LIQUIDITY EVENT.

11:05AM 6 AND WITH A PUBLIC COMPANY, THAT'S EASILY ASCERTAINABLE.
11:05AM 7 AND WITH A PRIVATE COMPANY AND LIMITED SHAREHOLDERS, IT IS
11:05AM 8 REALLY GUESSWORK TO ASCERTAIN THE LIQUIDITY OF PRIVATE STOCK OR
11:06AM 9 WHAT THE TIME PERIOD SHOULD BE BEFORE A LIQUIDITY EVENT HAPPENS
11:06AM 10 IN THE FUTURE.

11:06AM 11 THERE ARE UNKNOWNNS, AND THEY REALLY INVOLVE A LOT OF
11:06AM 12 GUESSWORK. THAT WOULD BE -- MAYBE THAT WOULD BE OKAY. THE
11:06AM 13 PROBLEM IS IF YOU CHANGE EITHER ONE OF THESE INPUTS, IT GREATLY
11:06AM 14 IMPACTS THE VALUE THAT YOU END UP WITH PER SHAREHOLDER, AND
11:06AM 15 THESE HUGE SWINGS ARE JUST NOT APPROPRIATE FOR THE COURT TO USE
11:06AM 16 WHEN WE'RE TALKING ABOUT A CRIMINAL CASE AND SENTENCING AN
11:06AM 17 INDIVIDUAL TO WHAT COULD BE A LONG PERIOD OF TIME IN JAIL TO
11:06AM 18 RELY ON A METHOD WHERE IF YOU TWEAK ONE THING, IT SWINGS BY
11:06AM 19 HUNDREDS OF MILLIONS OF DOLLARS. IT JUST DOESN'T SEEM
11:06AM 20 REASONABLE TO RELY ON THAT METHODOLOGY.

11:07AM 21 SO WHERE DOES THAT LEAVE US WITH MR. SABA?

11:07AM 22 AS I'VE SAID, HIS METHODOLOGY, IT MAY BE FINE IN A CIVIL
11:07AM 23 CASE, BUT IT'S NOT RELIABLE ENOUGH TO MAKE A REASONABLE
11:07AM 24 ESTIMATE IN THESE CIRCUMSTANCES IN SENTENCING.

11:07AM 25 MR. SABA IS ALSO INCONSISTENT WITH HOW HE USES

1 INFORMATION. FOR EXAMPLE, HE USES THE TIME PERIOD UNTIL A
2 LIQUIDITY EVENT. HE BASES THAT ON THE ARANCA REPORT, BUT HE
3 REJECTS THE ARANCA'S RATE OF RETURN. AND THERE'S NO REASON WHY
4 HE'S PICKING AND CHOOSING CERTAIN THINGS TO USE FROM ARANCA AND
5 NOT WITHOUT ANY EXPLANATION.

6 SO NO MATTER WHAT APPROACH MR. SABA USES, THE PROBLEM IS,
7 AS I JUST SAID, THE VALUE THAT HE LANDS ON IF YOU TWEAK ONE
8 THING ABOUT HIS APPROACH, WHICH MR. WEINGUST BELIEVES SHOULD BE
9 DONE TO BE ACCURATE, THE VALUE OF THERANOS GOES UP BY HUNDREDS
10 OF MILLIONS OF DOLLARS AND THE LOSS GOES DOWN BY HUNDREDS OF
11 MILLIONS OF DOLLARS.

12 SO WHAT IT SHOWS IS THAT IT'S NOT A RELIABLE METHODOLOGY
13 TO USE WHEN ASSESSING LOSS.

14 SO WE DON'T THINK THE GOVERNMENT HAS PROVEN EVEN BY A
15 PREPONDERANCE LOSS IN THIS CASE. EVEN WITH THE BENEFIT OF
16 MR. SABA'S REPORT, IT'S TOO SPECULATIVE. AND WHEN YOU LOOK AT
17 THE ECONOMIC REALITY OF WHAT HAPPENED HERE, IT'S A TOTALLY
18 DIFFERENT PICTURE.

19 WHAT HAPPENED IS MR. BALWANI LEFT THERANOS IN MAY 2016.
20 WHEN HE LEFT THERANOS, THERE WAS \$350,000 IN THE BANK, THERE
21 WAS IP THAT THERANOS OWNED WORTH HUNDREDS OF MILLIONS OF
22 DOLLARS, AND THAT'S EVIDENCED BY FORTRESS'S LOAN OF
23 \$100 MILLION THAT IT EXTENDED TO THERANOS. AS A PRACTICE, THE
24 VALUE OF THE COLLATERAL IS GOING TO BE WORTH MULTIPLES OF THE
25 FACE AMOUNT OF THE LOAN. THE PERKINS COIE REPORT VALUED

11:09AM 1 THERANOS'S IP AS POTENTIALLY GENERATING HUNDREDS OF MILLIONS OF
11:09AM 2 DOLLARS. AND AFTER MR. BALWANI LEFT THERANOS -- I THINK I JUST
11:09AM 3 MISSPOKE. I SAID 350,000 IN THE BANK. IT'S 350 MILLION.
11:09AM 4 APOLOGIES. A BIG DIFFERENCE.

11:09AM 5 SO THERE'S A HUGE AMOUNT OF CASH IN THE BANK AND A HUGE
11:09AM 6 VALUE OF IP THAT THE COMPANY OWNS.

11:09AM 7 AND WHEN MR. BALWANI LEAVES THERANOS, THERANOS HAS TO
11:10AM 8 DECIDE WHAT TO DO WITH THOSE ASSETS. IS IT GOING TO CONTINUE
11:10AM 9 ITS BUSINESS OF TESTING BLOOD? IS IT GOING TO PUT A PAUSE ON
11:10AM 10 ITS BUSINESS AND SHUT DOWN AND REPAY ALL OF ITS INVESTORS? IS
11:10AM 11 IT GOING TO LICENSE ITS IP AND TRY TO GENERATE REVENUE THAT WAY
11:10AM 12 TO GIVE ITS INVESTORS A RETURN ON THEIR INVESTMENTS? ALL OF
11:10AM 13 THOSE ARE DECISIONS THAT HAD TO BE ANALYZED AND MADE.

11:10AM 14 MR. BALWANI WAS NO PART OF THAT. HE WAS GONE FROM THE
11:10AM 15 COMPANY. HE HAD NO CONTROL OVER THOSE DECISIONS. THOSE
11:10AM 16 DECISIONS WERE BEING MADE BY ELIZABETH HOLMES, THE BOARD OF
11:10AM 17 DIRECTORS, AND INVESTORS WHO WERE COMMUNICATING WITH THEM AT
11:10AM 18 THE TIME.

11:10AM 19 SO THE GOVERNMENT'S PROPOSITION THAT, WELL, THE INVESTORS
11:10AM 20 LOST EVERYTHING AND MR. BALWANI SHOULD BE ON THE HOOK FOR THAT
11:10AM 21 LOSS IS -- IT CANNOT BE SUSTAINED BECAUSE MR. BALWANI LEFT
11:11AM 22 THERANOS BEFORE THE INVESTORS LOST THEIR MONEY. THERE WERE SO
11:11AM 23 MANY INTERVENING FACTORS THAT BREAK THE CHAIN OF CAUSATION
11:11AM 24 BETWEEN THE INVESTORS BUYING THERANOS STOCK AND THEN AT THE END
11:11AM 25 OF THE DAY LOSING THEIR MONEY WHEN THERANOS SHUT ITS DOORS.

1 AND ONE OF THOSE INVESTORS WAS MR. BALWANI. HE LOST THE
2 MILLIONS OF DOLLARS THAT HE USED TO BUY THERANOS STOCK. AND HE
3 HAD NO CONTROL OVER THAT.

4 SO, YOUR HONOR, JUST TO SUM UP ON LOSS, THE GOVERNMENT HAS
5 NOT MET ITS BURDEN BY CLEAR AND CONVINCING EVIDENCE OR BY A
6 PREPONDERANCE TO SHOW THAT THE LOSSES THAT THE INVESTORS
7 SUSTAINED WERE CAUSED BY MR. BALWANI'S CONDUCT.

8 THE WAY THEY APPROACH LOSS USING THE SABA REPORT IS SO
9 SPECULATIVE AND UNRELIABLE THAT THE COURT SHOULD NOT USE IT.
10 IT CANNOT YIELD A REASONABLE ESTIMATE OF LOSS. IT'S WAY TOO
11 COMPLICATED.

12 AND, IN FACT, I WOULD JUST NOTE THAT THE GOVERNMENT
13 DOESN'T CITE ANY NINTH CIRCUIT CASE WHERE THE COURT USES A
14 METHODOLOGY TO ASSESS SHARE PRICE OR VALUE FOR A PRIVATE
15 COMPANY.

16 THEY CITE TO THE LEONARD CASE IN THE SECOND CIRCUIT AND
17 OTHER SECOND CIRCUIT CASES. AND THE LEONARD CASE, I MEAN THE
18 LEONARD CASE ACTUALLY REVERSED THE DISTRICT COURT FOR DOING
19 EXACTLY WHAT THE GOVERNMENT IS RECOMMENDING TO THIS COURT.

20 THE LEONARD DISTRICT COURT SAID THE WHOLE LOSS -- THAT THE
21 DEFENDANT IS RESPONSIBLE FOR THE ENTIRE LOSS, AND THE SECOND
22 CIRCUIT REVERSED ON THAT.

23 AND ALL THE SECOND CIRCUIT SAID IS DISTRICT COURT, COME UP
24 WITH A METHODOLOGY THAT IS REASONABLE. THAT'S WHAT WE LEARNED
25 FROM THAT CASE.

11:13AM 1 WE HAVE NO CASE LAW TO ESTABLISH WHAT A REASONABLE
11:13AM 2 METHODOLOGY IS. AND THIS CASE IN THIS COMPANY, AND BASED ON
11:13AM 3 ALL OF THESE INVESTORS WHO WERE INVESTING FOR DIFFERENT
11:13AM 4 REASONS, IT'S WAY TOO COMPLICATED AND SPECULATIVE TO ASCERTAIN
11:13AM 5 A REASONABLE AMOUNT OF LOSS.

11:13AM 6 THE GUIDELINES TELL US WHAT TO DO IN THOSE CIRCUMSTANCES.
11:13AM 7 WE LOOK TO WHAT THE DEFENDANT GAINED, AND WE ALL KNOW THAT
11:13AM 8 MR. BALWANI GAINED NOTHING FROM HIS TIME AT THERANOS. IN FACT,
11:13AM 9 HE LOST MONEY.

11:13AM 10 SO FOR THAT REASON, WE THINK THE LOSS ENHANCEMENT SHOULD
11:13AM 11 BE ZERO.

11:13AM 12 THE COURT: SO LET ME JUST CAPTURE THAT.

11:13AM 13 THE JURY HEARD THE EVIDENCE IN THE TRIAL, THEY CONVICTED
11:13AM 14 MR. BALWANI OF EVERY ONE OF THE CHARGES THAT WAS PRESENTED TO
11:13AM 15 THEM, INCLUDING THE WIRE FRAUD COUNTS, AND YOU BELIEVE THAT
11:14AM 16 THERE'S NO LOSS, THAT THE COURT SHOULD FIND NO LOSS? IS THAT
11:14AM 17 WHAT I'M HEARING YOU SAY?

11:14AM 18 MS. WALSH: THAT THERE SHOULD BE NO ADJUSTMENT FOR
11:14AM 19 LOSS, THAT'S RIGHT.

11:14AM 20 THE COURT: WHAT SHOULD THE LOSS AMOUNT BE IN YOUR
11:14AM 21 OPINION?

11:14AM 22 MS. WALSH: FOR MR. BALWANI, IT'S ZERO.

11:14AM 23 THE COURT: OKAY. OKAY.

11:14AM 24 MS. WALSH: YEAH.

11:14AM 25 THE COURT: OKAY. THANK YOU.

11:14AM 1 MR. LEACH.

11:14AM 2 MR. LEACH: THANK YOU, YOUR HONOR.

11:14AM 3 I'D LIKE TO ADDRESS EACH OF MS. WALSH'S POINT IF I COULD,
11:14AM 4 BUT I WOULD START BY SAYING THAT WE ARE NOT STARTING FROM A
11:14AM 5 BLANK SLATE HERE.

11:14AM 6 MOST, IF NOT ALL, OF THESE ARGUMENTS WERE MADE IN THE
11:14AM 7 HOLMES SENTENCING WHERE THE COURT MADE FINDINGS BASED ON THE
11:14AM 8 SABA REPORT, BASED ON MS. RAVITZ'S TESTIMONY. I THINK THE ONLY
11:14AM 9 NEW INFORMATION HERE THAT WE'RE DEALING WITH IS EXPERT
11:14AM 10 DECLARATIONS TENDERED BY MR. BALWANI. I'LL GET TO THOSE, BUT
11:14AM 11 MOST IF NOT EVERYTHING THAT HAS BEEN RAISED HERE WAS RAISED AND
11:14AM 12 CONSIDERED IN THE HOLMES SENTENCING UNDER IDENTICAL
11:15AM 13 CIRCUMSTANCES, AND THERE'S SIMPLY NOTHING NEW BESIDES THE
11:15AM 14 EXPERT DECLARATIONS THAT SHOULD ALTER THE COURT'S FINDINGS THAT
11:15AM 15 IT MADE IN THE HOLMES SENTENCING.

11:15AM 16 NOW, WE'VE ARGUED THAT THE LOSS IS THE FULL AMOUNT OF THE
11:15AM 17 C1 AND C2 INVESTMENTS. WE RECOGNIZE THE COURT DISAGREED WITH
11:15AM 18 THAT IN THE HOLMES SENTENCING.

11:15AM 19 WE PRESERVE OUR ARGUMENT ON THAT POINT, BUT I'M GOING TO
11:15AM 20 FOCUS ON THE LOSS BASED ON THE COURT'S FINDINGS IN THE HOLMES
11:15AM 21 SENTENCING BASED ON THE SABA REPORT, WHICH WE CONTINUE TO
11:15AM 22 BELIEVE PROVIDE A SOUND AND RELIABLE BASIS TO CALCULATE THE
11:15AM 23 LOSS IN THIS CASE.

11:15AM 24 AND IT'S IMPORTANT TO REMEMBER, YOUR HONOR, THE COURT'S
11:15AM 25 JOB HERE, THE COURT'S OBLIGATION IS TO HAVE A REASONABLE

11:15AM 1 ESTIMATE OF LOSS, NOT AN EXACT CALCULATION, AN ESTIMATE OF
11:15AM 2 LOSS. THAT'S WHAT THE GUIDELINES CALL FOR.

11:15AM 3 AND THE GUIDELINES SAY THAT THIS IS A TASK BEST SUITED FOR
11:15AM 4 THE DISTRICT JUDGE WHO OVERSAW THE TRIAL AND THAT THERE'S NOT A
11:16AM 5 ONE-SIZE-FITS-ALL APPROACH. THERE'S A NUMBER OF FACTORS THAT
11:16AM 6 THE COURT IS SUPPOSED TO CONSIDER, AND THE GUIDELINES RECOGNIZE
11:16AM 7 THAT THERE'S NOT ONLY ONE WAY TO CALCULATE THE LOSS. THE
11:16AM 8 JUDGE'S JOB IS TO FIND A REASONABLE ESTIMATE. THIS IS NOT AN
11:16AM 9 EXACT SCIENCE.

11:16AM 10 WE KNOW HERE THAT THE INVESTORS IN THIS CASE LOST
11:16AM 11 EVERYTHING, EACH OF THE COUNTS OF CONVICTION, ALL OF THE
11:16AM 12 INVESTORS THAT WE SUBMITTED IN MY DECLARATION IN THE HOLMES
11:16AM 13 CASE. THIS ISN'T A CASE WHERE, YOU KNOW, THEY -- IF YOU VALUE
11:16AM 14 IT ON ONE DAY YOU HAVE X, IF THE STOCK KEEPS TRADING, THEY HAVE
11:16AM 15 Y. THEY LOST ALL OF THEIR MONEY.

11:16AM 16 AND THE POINT OF THE SABA EXERCISE IS TO TRY TO AFFIX A
11:16AM 17 RESIDUAL VALUE TO THE STOCK ON A PARTICULAR DATE. THE DATE
11:16AM 18 THAT THE COURT SELECTED IN THE HOLMES CASE WAS DECEMBER 31ST,
11:16AM 19 2014.

11:16AM 20 IT'S ALSO IMPORTANT TO REMEMBER IN TERMS OF THE BURDEN OF
11:16AM 21 PROOF, I DIDN'T HEAR ANYTHING NEW FROM MS. WALSH IN TERMS OF
11:17AM 22 THE CASES. THE LONICH CASE WAS CITED BY MS. HOLMES AND RELIED
11:17AM 23 ON.

11:17AM 24 AND THE NINTH CIRCUIT IS CLEAR THROUGH THE LAURIENTI CASE
11:17AM 25 AND THE BERGER CASE THAT WHEN YOU'RE TALKING ABOUT COUNTS WHERE

11:17AM 1 YOU HAVE A CONVICTION, HERE WIRE FRAUD, HERE A CONSPIRACY TO
11:17AM 2 DEFRAUD INVESTORS, THE APPROPRIATE STANDARD IS PREPONDERANCE OF
11:17AM 3 EVIDENCE, AND THAT'S THE STANDARD THAT THE COURT APPLIED IN THE
11:17AM 4 HOLMES SENTENCING. THERE'S NO NEW CASE LAW ON THIS, THERE'S NO
11:17AM 5 NUANCE FOR MR. BALWANI THAT MAKES IT DIFFERENT, AND THE COURT
11:17AM 6 SHOULD CONTINUE TO APPLY THAT PREPONDERANCE STANDARD.

11:17AM 7 I WOULD SUBMIT THAT WE MEET ANY STANDARD, YOUR HONOR, BUT
11:17AM 8 PREPONDERANCE IS WHAT CONTROLS HERE.

11:17AM 9 IN TERMS OF THE NEW FACTS THAT MS. WALSH POINTED OUT, SHE
11:17AM 10 RAISED A COUPLE RELIANCE ISSUES WITH RESPECT TO PARTICULAR
11:17AM 11 INVESTORS. SHE MENTIONED MR. MURDOCH. THAT WAS AN INVESTOR
11:18AM 12 WHERE THE COURT MADE FINDINGS IN THE HOLMES CASE.

11:18AM 13 THERE'S NO NEW FACTS IN THE RECORD BASED ON THAT. THE
11:18AM 14 COURT HAS MS. RAVITZ'S SWORN TESTIMONY ON THIS POINT. AND
11:18AM 15 SHE'S VERY MUCH IN THE SAME POSITION AS LISA PETERSON WAS FOR
11:18AM 16 RDV, WHO THE COURT ALSO HEARD IN TWO TRIALS AND FOUND WAS A
11:18AM 17 COMPETENT WITNESS TO TESTIFY OR PROVIDE INFORMATION ABOUT
11:18AM 18 RELIANCE IN THIS PARTICULAR SETTING.

11:18AM 19 SHE WAS THE CHIEF OF STAFF FOR MR. MURDOCH. SHE SAT
11:18AM 20 THROUGH TWO MEETINGS WITH MS. HOLMES AND MR. BALWANI. SHE
11:18AM 21 RECEIVED THE TWO BINDERS OF DUE DILIGENCE MATERIALS. THE COURT
11:18AM 22 IS, BY NOW, VERY FAMILIAR WITH THE BINDERS THAT WERE PROVIDED
11:18AM 23 TO INVESTORS THAT WERE COMPILED BY MR. EDLIN. SHE HAD THOSE,
11:18AM 24 AND SHE REVIEWED THOSE ALONG WITH MR. MURDOCH. SHE HAD THE
11:18AM 25 SAME REVENUE PROJECTIONS THAT WENT TO INVESTORS, AND THOSE WERE

11:18AM 1 IN PART OF THE CALCULUS BEHIND THE INVESTMENTS.

11:18AM 2 SHE SAID THAT SHE AND MR. MURDOCH WERE TOLD AND THEY
11:19AM 3 THOUGHT THE WAG DEAL WAS GROWING AND GENERATING MILLIONS OF
11:19AM 4 DOLLARS IN REVENUE. THIS IS IMPORTANT BECAUSE IT'S IN DECEMBER
11:19AM 5 OF 2014, AND THIS IS A TIME PERIOD WHERE MR. BALWANI KNOWS FROM
11:19AM 6 MR. JHAVERI AND OTHERS AT WALGREENS THAT THEY'RE NOT GOING TO
11:19AM 7 EXPAND BEYOND THE 40 STORES BECAUSE THEY CAN'T GET THE RATIO OF
11:19AM 8 THE FINGERSTICK TESTING DOWN. THEY KNOW ALL OF THAT BY
11:19AM 9 DECEMBER 14TH, 2014 AND NONE OF THAT IS DISCLOSED TO MS. RAVITZ
11:19AM 10 OR TO MR. MURDOCH.

11:19AM 11 SHE WAS THERE WHEN MS. HOLMES AND MR. BALWANI SHOWED THEM
11:19AM 12 THE BOX THAT PURPORTEDLY WAS DOING ALL OF THE TESTING. SHE WAS
11:19AM 13 TOLD THAT THERE WERE USES IN THE MILITARY SITUATION.

11:19AM 14 CRITICALLY, SHE TESTIFIED TO QUESTIONS THAT MR. MURDOCH
11:19AM 15 WAS ASKED IN THESE MEETINGS. ONE OF THEM WAS DIRECTED RIGHT TO
11:19AM 16 MR. BALWANI, WHICH WAS HOW RELIABLE ARE THESE REVENUE
11:19AM 17 PROJECTIONS? AND MR. BALWANI SAID A MAXIMUM DOWNSIDE RISK OF
11:20AM 18 THESE HUNDRED MILLION DOLLAR PROJECTIONS IS 30 PERCENT.

11:20AM 19 THE COURT KNOWS FROM MS. RAVITZ'S TESTIMONY EXACTLY WHAT
11:20AM 20 WAS TOLD TO MR. MURDOCH. IT CAN DRAW INFERENCES BASED ON
11:20AM 21 TESTIMONY ABOUT WHAT WAS RELEVANT. THEY HAVEN'T CITED A SINGLE
11:20AM 22 CASE FOR THE PROPOSITION THAT IN SENTENCING WHERE CALCULATING
11:20AM 23 THE LOSS, YOU NEED TO CALL EACH AND EVERY INVESTOR IN THE
11:20AM 24 COMPANY, PUT THEM ON THE STAND, ASK THEM QUESTIONS AS YOU WOULD
11:20AM 25 IN A TRIAL IN ORDER TO DRAW THE REASONABLE ESTIMATE OF LOSS

11:20AM 1 THAT THE COURT MUST ASSESS IN SENTENCING.

11:20AM 2 WE HAVE MORE THAN MET OUR BURDEN ON THAT POINT.

11:20AM 3 THERE WAS ALSO SOME REFERENCE IN THE BRIEFING TO
11:20AM 4 MS. PETERSON, LIKE MS. HOLMES, THEY MAKE THIS ARGUMENT THAT
11:20AM 5 BECAUSE MS. PETERSON WAS NOT THE FINAL DECISION-MAKER AT RDV,
11:20AM 6 SHE'S INCOMPETENT TO TESTIFY TO RDV'S RELIANCE. THERE'S NO
11:20AM 7 CASE THAT SUPPORTS THAT.

11:20AM 8 AND MS. PETERSON'S TESTIMONY THROUGHOUT BOTH TRIALS IS
11:21AM 9 REplete WITH EVIDENCE SUPPORTING HER KNOWLEDGE OF WHAT WAS SAID
11:21AM 10 AND HER KNOWLEDGE OF WHAT WAS IMPORTANT TO RDV. AND I WOULD
11:21AM 11 DIRECT THE COURT TO IN THE HOLMES TRIAL, TRIAL TRANSCRIPT 4759
11:21AM 12 SHE TESTIFIED WE WERE RELYING ON WHAT WE WERE TOLD. SHE SAID
11:21AM 13 WE WERE RELYING ON WHAT WE WERE TOLD BY THEM ON THE ACCURACY OF
11:21AM 14 THE ANALYZER. SHE SAID THE PFIZER DOCUMENT WAS VERY IMPORTANT
11:21AM 15 TO THEM. SHE SAID SHE WAS NOT JUST RELYING ON WHAT WAS IN
11:21AM 16 WRITING, SHE WAS RELYING ON WHAT WE WERE TOLD.

11:21AM 17 AND SHE WAS ALSO THE ONE WHO PREPARED THE APPROVAL
11:21AM 18 DOCUMENT FOR RDV MEMORIALIZING FOR THEIR RECORDS, YOU KNOW,
11:21AM 19 WHAT THEY WERE TOLD, WHAT WAS IMPORTANT FOR THEM, AND WHAT THEY
11:21AM 20 RELIED ON.

11:21AM 21 SO THE NOTION THAT YOU NEED TO HAVE SWORN TESTIMONY IN A
11:21AM 22 SENTENCING PROCEEDING WITH EACH AND EVERY INVESTOR SAYING "I
11:21AM 23 RELIED ON THIS" IS JUST NOT SUPPORTED BY THE CASES, AND THE
11:21AM 24 COURT HAS AMPLE FACTUAL INFORMATION IN THE RECORD TO SUPPORT
11:22AM 25 THE FINDINGS THAT IT MADE IN THE HOLMES SENTENCING WHICH SHOULD

11:22AM 1 APPLY EQUALLY HERE.

11:22AM 2 THE COURT: LET ME ASK YOU -- PARDON ME, MR. LEACH.

11:22AM 3 ARE THERE ANY VICTIMS PRESENT THAT WISH TO BE HEARD?

11:22AM 4 MR. LEACH: NOT TO MY KNOWLEDGE, YOUR HONOR.

11:22AM 5 THE COURT: ALL RIGHT. THANK YOU.

11:22AM 6 MR. LEACH: LET ME TURN TO MR. SABA BECAUSE I THINK
11:22AM 7 THE ONLY REAL NEW FACTUAL INFORMATION THAT THE COURT HAS IS TWO
11:22AM 8 EXPERT DECLARATIONS OR TWO FOR MR. WEINGUST AND ANOTHER ONE
11:22AM 9 FROM MR. REIFF.

11:22AM 10 I WANT TO START BY SAYING THAT THERE IS SOME DISPARITY IN
11:22AM 11 THE QUALIFICATIONS OF THE EXPERTS THAT MIGHT NOT BE OBVIOUS
11:22AM 12 FROM SOME OF THE MATERIALS, BUT I THINK ARE SIGNIFICANT IN
11:22AM 13 EVALUATING PARTICULARLY MR. WEINGUST.

11:22AM 14 MR. SABA IS AN ACCREDITED SENIOR APPRAISER WITH THE
11:22AM 15 AMERICAN SOCIETY OF APPRAISERS. HE'S ALSO ACCREDITED IN
11:23AM 16 BUSINESS VALUATIONS BY THE AICPA, THE PROFESSIONAL ACCOUNTING
11:23AM 17 ASSOCIATION.

11:23AM 18 AND WHAT THAT -- AND MR. WEINGUST HAS NEITHER OF THOSE
11:23AM 19 CERTIFICATIONS.

11:23AM 20 MR. WEINGUST IS A MEMBER OF ANOTHER ORGANIZATION CALLED A
11:23AM 21 NATIONAL ASSOCIATION OF CERTIFIED EVALUATORS AND ANALYSTS, BUT
11:23AM 22 HE'S NOT CERTIFIED BY THAT ORGANIZATION. MR. SABA IS.

11:23AM 23 AND WHY ARE THESE CERTIFICATIONS IMPORTANT? IT'S BECAUSE
11:23AM 24 IN DOING HIS REPORT, MR. SABA WAS REQUIRED TO COMPLY WITH THE
11:23AM 25 STANDARDS THAT APPLY TO THOSE EVALUATORS, AND YOU CAN SEE THIS

11:23AM 1 AT THE TAIL END OF MR. SABA'S INITIAL REPORT, HE SAYS, "I
11:23AM 2 CERTIFY TO ALL OF THE FOLLOWING." THAT MEANS HE FOLLOWED THE
11:23AM 3 STANDARDS OF THE AICPA IN PREPARING HIS REPORT, THAT MEANS HE
11:23AM 4 FOLLOWED THE STANDARDS OF AMERICAN SOCIETY OF APPRAISERS IN
11:23AM 5 PREPARING HIS REPORT, AND I THINK THAT CAN GIVE THE COURT ADDED
11:23AM 6 ASSURANCE THAT BECAUSE MR. SABA IS COMPLYING WITH THE
11:24AM 7 STANDARDS, DOING WHAT ACCOUNTANTS AND APPRAISERS DO EVERY DAY
11:24AM 8 IN TRYING TO DO SOMETHING THAT IS VERY HARD, WHICH IS TO VALUE
11:24AM 9 A COMPANY, AND PARTICULARLY HARD WHEN YOU'RE TRYING TO VALUE A
11:24AM 10 COMPANY AND DISENTANGLE A RISK THAT I THINK THE COURT IS RIGHT
11:24AM 11 IS NOT ACCOUNTED FOR BY INVESTORS OR BY -- AT LEAST THEY
11:24AM 12 SHOULDN'T HAVE TO ACCOUNT FOR IT, AND THAT'S THE RISK OF FRAUD.

11:24AM 13 SO THERE'S A VERY MEANINGFUL DIFFERENCE BETWEEN THE TWO
11:24AM 14 EXPERTS THAT THE COURT HAS. WEINGUST IS A LAWYER, AND I'M NOT
11:24AM 15 CASTING ANY ASPERSIONS ON HIS QUALIFICATIONS, BUT HE DIDN'T
11:24AM 16 LOOK AT ANY DOCUMENTS, AS FAR AS I CAN TELL, OTHER THAN THE
11:24AM 17 ARANCA REPORT THAT HE PROVIDED TO YOU. HE DIDN'T REVIEW THE
11:24AM 18 VOLUME OF MATERIAL THAT MR. SABA ATTACHED TO HIS REPORT TO
11:24AM 19 REALLY DIG INTO THE FORECAST, DIG INTO THE TESTIMONY TO TRY TO
11:24AM 20 FIGURE OUT WHAT WAS THE VALUE OF THIS COMPANY ON THIS
11:24AM 21 PARTICULAR DAY APPLYING THE STANDARDS.

11:24AM 22 AND I HAVE TO TAKE ISSUE WITH SOMETHING MS. WALSH SAID
11:24AM 23 EARLIER. I DON'T SEE ANYTHING IN MR. WEINGUST'S DECLARATIONS
11:25AM 24 THAT SAY THIS IS THE RIGHT DISCOUNT RATE TO APPLY, YOU SHOULD
11:25AM 25 APPLY THIS DISCOUNT RATE, AND THIS GENERATES A PARTICULAR

11:25AM 1 VALUE.

11:25AM 2 HE'S CRITICAL OF WHAT MR. SABA DOES, BUT IF YOU PARSE THE
11:25AM 3 DECLARATION, AND WE'VE LOOKED AT IT VERY CAREFULLY, YOUR HONOR,
11:25AM 4 HE'S SAYING I THINK 45 PERCENT IS TOO HIGH. IF YOU WERE TO
11:25AM 5 TAKE THIS 28 PERCENT NUMBER FROM THE SINGLE PEPPERDINE STUDY,
11:25AM 6 THIS IS WHAT HAPPENS. AND IF YOU TAKE THE 20 PERCENT NUMBER
11:25AM 7 IMPLIED BY ARANCA, THIS IS WHAT HAPPENS.

11:25AM 8 BUT MR. WEINGUST DOESN'T LOOK AT A SINGLE DOCUMENT OTHER
11:25AM 9 THAN THE ARANCA REPORT, HE DOESN'T REVIEW ANY OF THE TESTIMONY,
11:25AM 10 HE DOESN'T REVIEW ANYTHING ABOUT THE UNDERLYING TECHNOLOGY. HE
11:25AM 11 JUST SAYS, I HAVE A DIFFERENT -- YOU KNOW, I DISAGREED WITH
11:25AM 12 MR. SABA'S JUDGMENT ON THE 45 PERCENT, I'M NOT GOING TO TELL
11:25AM 13 YOU WHAT IT SHOULD BE, BUT IF YOU TAKE THESE OTHER TWO NUMBERS,
11:25AM 14 THIS IS WHAT YOU GET.

11:25AM 15 SO THIS ISN'T A SITUATION WHERE YOU HAVE AN EXPERT SAYING
11:26AM 16 X AND ANOTHER ONE SAYING Y. IT'S REALLY THE Y BEING CRITICAL
11:26AM 17 OF THE X, AND THE X HAS GONE THROUGH A VERY, VERY THOROUGH
11:26AM 18 PROCESS, COMPLYING WITH THE APPROPRIATE STANDARDS.

11:26AM 19 THE 45 PERCENT IS A MATTER OF JUDGMENT, BUT HERE IT'S A
11:26AM 20 MATTER OF JUDGMENT BASED ON VERY, VERY REASONABLE
11:26AM 21 CIRCUMSTANCES. LET ME EXPLAIN A LITTLE BIT WHY WE THINK THAT
11:26AM 22 IS SO AND WHY WE THINK THE COURT WAS RIGHT TO INCLUDE THAT IN
11:26AM 23 THE FIRST INSTANCE AND WHY MR. WEINGUST DOESN'T RAISE ANYTHING
11:26AM 24 TO MEANINGFULLY COUNTERACT THAT.

11:26AM 25 THE FIRST CRITIQUE I HEARD WAS HE'S USING THIS OLD DATA.

11:26AM 1 THIS SO-CALLED "OLD DATA" IS FROM A 2019 REPORT BY THE AICPA,
11:26AM 2 WHICH MR. WEINGUST IS NOT A MEMBER OF, IS NOT CERTIFIED BY, AND
11:26AM 3 THIS IS A TOOL ACCORDING TO MR. SABA THAT IS USED ROUTINELY IN
11:26AM 4 VALUATIONS OF COMPANIES, BOTH PRIVATE AND PUBLIC, AND THIS IS
11:27AM 5 DATA THAT IS IN AS AUTHORITATIVE LITERATURE AS YOU CAN GET IN
11:27AM 6 THIS AREA.

11:27AM 7 SO WE APPRECIATE THAT MR. SABA THINKS IT'S OLD. IT'S HARD
11:27AM 8 TO GET DATA ON PRIVATE VENTURE CAPITAL COMPANIES.

11:27AM 9 MR. WEINGUST WOULD HAVE YOU RELY ON ONE SINGLE REPORT FROM
11:27AM 10 PEPPERDINE.

11:27AM 11 MR. SABA IS TAKING A MORE HOLISTIC APPROACH BASED ON DATA
11:27AM 12 THAT ISN'T OLD BUT IS DATA AUTHORITATIVELY RELIED UPON BY THE
11:27AM 13 AICPA.

11:27AM 14 THERE'S ALSO CRITICISM ON JUST USING THAT PEPPERDINE
11:27AM 15 NUMBER. THE COURT COMMENTED ON, WELL, DID HE USE THE 2021
11:27AM 16 NUMBERS OR THE 2015 NUMBERS? I HOPE WE MADE THIS CLEAR IN OUR
11:27AM 17 REPLY BRIEF, WHEN IT COMES TO THE PEPPERDINE STUDY, MR. SABA
11:27AM 18 WAS USING THE 25 -- THE 2015 NUMBERS.

11:27AM 19 IF YOU LOOK AT SOME OF THE SUPPORTING SCHEDULES AND YOU
11:27AM 20 COMPARE THEM TO MR. WEINGUST'S DECLARATION, YOU'LL SEE THAT
11:27AM 21 IT'S 2015 NUMBERS. THEY'RE APPLES TO APPLES. THERE IS A TYPO
11:28AM 22 IN MR. SABA'S REPORT THAT SAYS 2021 MANUAL, BUT THE TYPO IS THE
11:28AM 23 REFERENCE TO THE MANUAL, NOT THE USE OF THE PEPPERDINE STUDY.

11:28AM 24 SO I HEARD MS. WALSH SAYING SOMETHING SLIGHTLY DIFFERENT,
11:28AM 25 AND I JUST WANT TO MAKE SURE THAT WE'RE CLEAR ON THAT POINT.

11:28AM 1 WHY IS IT WRONG TO USE THE ARANCA NUMBERS, THE 20 PERCENT?

11:28AM 2 WELL, WE KNOW THAT ARANCA WAS LIED TO, YOUR HONOR. WE KNOW

11:28AM 3 THAT ARANCA IS A VALUATION COMPANY BASED IN INDIA. I THINK THE

11:28AM 4 CROSS-EXAMINATION OF MS. SPIVEY IN THE BALWANI TRIAL WAS ARANCA

11:28AM 5 IS NOT REALLY THAT -- THE COST FOR AN ARANCA REPORT IS NOT THE

11:28AM 6 SAME AS GETTING A VALUATION REPORT FROM DUFF & PHELPS, BUT NOW

11:28AM 7 MR. WEINGUST IS SAYING OR SUGGESTING THAT'S SOMETHING THAT THE

11:28AM 8 COURT SHOULD LOOK TO.

11:28AM 9 BUT IF YOU LOOK AT THE VALUATION REPORT FROM 2014, ARANCA

11:29AM 10 IS ASSUMING, BASED ON WHAT THEY'RE TOLD BY MS. HOLMES AND

11:29AM 11 MR. BALWANI, THAT THERANOS IS GOING TO GO FROM \$150,000 IN

11:29AM 12 REVENUE IN DECEMBER OF 2014 TO \$113 MILLION IN REVENUE THE

11:29AM 13 FOLLOWING YEAR.

11:29AM 14 NOT ONLY DO WE KNOW THAT DIDN'T HAPPEN, WE KNEW AT

11:29AM 15 DECEMBER 2014 THERE WAS NO WAY THAT WAS GOING TO HAPPEN BECAUSE

11:29AM 16 WALGREENS WAS SAYING WE'RE NOT GOING TO EXPAND PAST 40 STORES

11:29AM 17 UNTIL YOU CAN GET YOUR TECHNOLOGY TO DO THE FINGERSTICKS MORE

11:29AM 18 APPROPRIATELY. YOU DON'T SEE ANYTHING LIKE THAT IN THE ARANCA

11:29AM 19 REPORT.

11:29AM 20 MR. WEINGUST SAYS ARANCA DID ALL OF THIS DUE DILIGENCE.

11:29AM 21 THERE'S ZERO EVIDENCE IN THE RECORD ABOUT THE DILIGENCE THAT

11:29AM 22 ARANCA DID.

11:29AM 23 AND IF YOU LOOK CLOSELY AT THE FORECASTS THAT WERE

11:29AM 24 PROVIDED TO ARANCA, THESE ARE PIE IN THE SKY SUCCESS SCENARIO

11:29AM 25 PROJECTIONS UNDER THE BEST CASE, BASED ON EVERYTHING THAT WE

11:30AM 1 KNOW FROM THIS TRIAL, AND THAT'S NOTHING THAT MR. WEINGUST
11:30AM 2 READ, CONSIDERED, THOUGHT ABOUT. YOU JUST CAN'T LOOK AT THE
11:30AM 3 ARANCA REPORTS BASED ON WHAT WE KNOW AND BASED UPON WHAT WE
11:30AM 4 HEARD IN THIS TRIAL AND THINK THAT THEY'RE ANYWHERE NEAR THE
11:30AM 5 RIGHT NUMBERS THAT SHOULD GO INTO CALCULATING THE DISCOUNT
11:30AM 6 RATE.

11:30AM 7 SO THE 45 PERCENT IS CONSIDERING THE PEPPERDINE REPORT,
11:30AM 8 ANOTHER BATCH OF COMPANIES FROM A WIDER PERIOD OF TIMEFRAME,
11:30AM 9 AND THE ACTUAL IMPLIED RATE OF RETURN THAT THE INVESTORS IN
11:30AM 10 THIS CASE THROUGH THEIR MODELING APPLIED.

11:30AM 11 I KNOW MR. WEINGUST IN HIS SUPPLEMENTAL DECLARATION
11:30AM 12 CRITIQUES THAT, BUT IT'S ACTUALLY IN THE SABA REPORT AND IN
11:30AM 13 WHAT HE DESCRIBED AS THE BUILD MODEL, LIKE YOU CAN SEE HIM
11:30AM 14 TAKING THE PROJECTIONS THAT WERE PROVIDED TO INVESTORS, TAKING
11:30AM 15 THE PRICE THAT THEY BOUGHT AT, AND USING THAT TO CALCULATE WHAT
11:30AM 16 WAS THEIR IMPLIED RATE OF RETURN, AND THAT'S PART OF THE MIX OF
11:31AM 17 INFORMATION THAT GOES INTO MR. SABA'S JUDGMENT, GIVING THE
11:31AM 18 DEFENDANTS EVERY BENEFIT OF THE DOUBT IN TERMS OF SOLVING ALL
11:31AM 19 OF THEIR TECHNOLOGY PROBLEMS, MEETING THESE PIE IN THE SKY
11:31AM 20 REVENUE PROJECTIONS, GETTING FDA APPROVAL, GETTING ALL OF THE
11:31AM 21 PROBLEMS FIXED IN THE LAB, GIVING ALL OF THOSE BENEFITS OF THE
11:31AM 22 DOUBT TO THE DEFENDANT, THAT'S HOW MR. SABA LANDS ON THIS
11:31AM 23 45 PERCENT, WHICH IS A MATTER OF JUDGMENT, BUT THERE IS
11:31AM 24 JUDGMENT IN THIS. THERE'S NO DOUBT ABOUT THAT, YOUR HONOR.
11:31AM 25 BUT IT'S A JUDGMENT WELL GROUNDED IN THE TRIAL RECORD AND IN

11:31AM 1 THE FACTS THAT THE COURT HEARD, AND IT'S COMPLETELY APPROPRIATE
11:31AM 2 TO RELY ON.

11:31AM 3 MY COLLEAGUE ALSO BROUGHT UP THE FORTRESS TRANSACTION, AND
11:31AM 4 I DO THINK THAT THAT IS AN IMPORTANT DATA POINT FOR THE COURT
11:31AM 5 TO CONSIDER IN TERMS OF IS 121 MILLION SOMEHOW, YOU KNOW, JUST
11:32AM 6 NOT POSSIBLY THE LOSS IN THIS CASE. AND I THINK IT'S IMPORTANT
11:32AM 7 TO UNDERSTAND EXACTLY WHAT THE FORTRESS TRANSACTION WAS.

11:32AM 8 THIS WAS IN DECEMBER OF 2017. FORTRESS LENT \$60 MILLION
11:32AM 9 TO THERANOS SECURED BY ALL OF THE IP, ALL OF THE PATENTS THAT
11:32AM 10 THE COURT HEARD ABOUT, ALL OF THE PATENTS THAT MR. WEINGUST
11:32AM 11 TALKS ABOUT, A \$60 MILLION LOAN SECURED BY THE PATENTS, THE
11:32AM 12 INTELLECTUAL PROPERTY.

11:32AM 13 AND IF THERANOS COULD MEET PARTICULAR MILESTONES, IT MIGHT
11:32AM 14 GET AN ADDITIONAL 40 MILLION. THAT'S WHERE THE \$100 MILLION
11:32AM 15 COMES IN.

11:32AM 16 AT THE END OF THE DAY, THERANOS DEFAULTED ON THAT LOAN,
11:32AM 17 FORTRESS TOOK ALL OF THE IP, AND I THINK THAT'S THE ONLY REAL
11:32AM 18 TRANSACTION THAT WE HAVE TO ASSESS, WELL, WHAT WAS THAT IP
11:32AM 19 WORTH? WHAT -- STRIP AWAY THE CASH, WHAT WAS THE IP WORTH?

11:32AM 20 THE MOST FORTRESS WOULD LEND WAS \$60 MILLION.

11:33AM 21 NOW, LET'S SAY THAT THEY WERE DOUBLY COLLATERALIZED;
11:33AM 22 THAT'S \$120 MILLION. LET'S SAY THEY WERE TRIPLE
11:33AM 23 COLLATERALIZED; \$180 MILLION. FOUR TIMES COLLATERALIZED THAT
11:33AM 24 FORTRESS IS TAKING, YOU'RE AT 240 MILLION. ALL OF THESE
11:33AM 25 NUMBERS ARE SIGNIFICANTLY LESS THAN MR. SABA'S VALUATION,

11:33AM 1 GIVING THE DEFENDANTS ALL OF THE BENEFIT OF THE DOUBT.

11:33AM 2 THE FORTRESS TRANSACTION IS REMARKABLY HELPFUL IN TERMS OF
11:33AM 3 ASSESSING WHETHER OR NOT THESE ARE LOSS ESTIMATES THAT ARE
11:33AM 4 REALLY JUST SPECULATION OR ARE REALLY SOMETHING THAT ARE JUST
11:33AM 5 GIVING THE BENEFIT OF THE DOUBT TO THE DEFENDANTS. IT'S
11:33AM 6 MAGNITUDES OF VALUE LOWER.

11:33AM 7 MY COLLEAGUE ALSO TALKED ABOUT VOLATILITY AND HYPOTHETICAL
11:33AM 8 EXIT USING THE OPM MODEL. MR. SABA ATTEMPTED TO ADDRESS THAT
11:34AM 9 IN HIS SUPPLEMENTAL REPORT. YES, THIS IS HARD WORK. THERE ARE
11:34AM 10 ASSUMPTIONS THAT HAVE TO GO INTO THIS. WE'RE TRYING TO CREATE
11:34AM 11 A SCENARIO WHERE THERE WAS NO FRAUD, WHERE THERE WAS FULL
11:34AM 12 TRANSPARENT INFORMATION. THAT IS A HARD EXERCISE. WE
11:34AM 13 RECOGNIZE THAT.

11:34AM 14 BUT THE LEONARD CASE IN PARTICULAR SAYS THAT DOESN'T MEAN
11:34AM 15 WE THROW UP OUR HANDS AND DON'T ESTIMATE WHAT THE LOSS IS. THE
11:34AM 16 LEONARD CASE SAYS WE RECOGNIZE THIS IS A HARD JOB FOR DISTRICT
11:34AM 17 COURTS, BUT THERE ARE TOOLS AVAILABLE. THERE ARE A NUMBER OF
11:34AM 18 FACTORS TO GO THROUGH. AND I THINK THE COURT'S THOUGHTFUL
11:34AM 19 ASSESSMENT OF THE INCOME APPROACH IN THE HOLMES SENTENCING WAS
11:34AM 20 APPROPRIATE THEN AND IT'S APPROPRIATE NOW.

11:34AM 21 UNLESS THE COURT HAS FURTHER QUESTIONS, THE GOVERNMENT
11:34AM 22 SUBMITS ON THE LOSS POINT.

11:34AM 23 THE COURT: THANK YOU.

11:34AM 24 MS. WALSH: JUST A COUPLE OF POINTS, YOUR HONOR.

11:34AM 25 SO I THINK IT'S WELL-KNOWN, AND MR. WEINGUST AND I THINK

11:35AM 1 MR. SABA WOULD AGREE WITH THIS, THAT VENTURE CAPITAL FIRMS BAKE
11:35AM 2 A FAILURE SCENARIO INTO THEIR MODELS FOR COMING UP WITH RATES
11:35AM 3 OF RETURN. SO TO SAY, WELL, I HAVE THIS RATE OF RETURN THAT
11:35AM 4 VENTURE CAPITAL FIRMS WERE INVESTING IN DURING THIS TIME
11:35AM 5 PERIOD, BUT I NEED TO MAKE ADJUSTMENTS BECAUSE THEY DIDN'T KNOW
11:35AM 6 ABOUT ALL OF THESE BAD THINGS ABOUT THERANOS, YOU'RE DOUBLE
11:35AM 7 COUNTING RISK.

11:35AM 8 THEY'VE ALREADY TAKEN INTO ACCOUNT THE RISK OF THE
11:35AM 9 BUSINESS FAILING. WHETHER IT FAILS FOR BAD MANAGEMENT,
11:35AM 10 MISTAKES OR FRAUD, IT'S AN ECONOMIC ANALYSIS, FAILURE IS
11:35AM 11 FAILURE, AND THEY HAVE TAKEN THAT INTO ACCOUNT.

11:35AM 12 THE COURT: THEY DO? IS THAT YOUR UNDERSTANDING IS
11:35AM 13 WHEN RISK ANALYSIS IS TAKEN, THEY ALSO LOOK AT WHAT IS THE
11:35AM 14 POSSIBILITY OF INTERIOR CRIMINAL CONDUCT THAT COULD RESULT IN A
11:35AM 15 FAILURE AND A DEBACLE OF THIS COMPANY? IS THAT SOMETHING THAT
11:36AM 16 THEY DO?

11:36AM 17 MS. WALSH: NO.

11:36AM 18 THE COURT: OH.

11:36AM 19 MS. WALSH: MY UNDERSTANDING IS THAT IT WOULD BE THE
11:36AM 20 OPPOSITE. THEY LOOK AT RISK OF FAILURE. THEY DON'T SAY WHY IS
11:36AM 21 THE BUSINESS FAILING.

11:36AM 22 THE COURT: IT'S JUST FAILURE.

11:36AM 23 MS. WALSH: IT'S ECONOMIC FAILURE.

11:36AM 24 THE COURT: I SEE. OKAY.

11:36AM 25 MS. WALSH: JUST TO RESPOND TO A POINT THAT

MR. LEACH MADE ABOUT ARANCA. HE SAYS, WELL, ARANCA WAS LIED TO, AND, THEREFORE, WE CAN'T RELY ON THAT DISCOUNT RATE OR THAT RATE OF RETURN THAT IS IN THAT REPORT.

WELL, IF ARANCA WAS LIED TO AND IT'S NOT RELIABLE TO RELY ON THAT INFORMATION, THEN WHY IS MR. SABA RELYING ON ARANCA TO ESTABLISH THE TIME PERIOD UNTIL A LIQUIDITY EVENT? HE'S PICKING AND CHOOSING WHAT WITHIN THE ARANCA REPORT HE'S RELYING ON, AND THAT'S NOT AN APPROPRIATE WAY TO METHODICALLY AND NEUTRALLY COME UP WITH A VALUE.

THE COURT: SO WHAT SHOULD WE DO IF WE COMPLETELY ELIMINATED THE ARANCA, SHOULD THERE BE EVEN ANOTHER ANALYSIS THAT WE ELIMINATE ARANCA AND SAY CAN YOU MAKE A DECISION NOT RELYING ON THAT, OR IS IT BETTER PRACTICE TO ANALYZE EVERYTHING THAT IS ON THE TABLE AND THEN MAKE AT LEAST A BEST ESTIMATE?

MS. WALSH: SURE. I THINK IT IS BETTER TO ANALYZE EVERYTHING ON THE TABLE, BUT YOU CAN'T SAY ARANCA IS ON THE TABLE AND I'M GOING TO CHOOSE THE TIME PERIOD FOR A LIQUIDITY EVENT, THAT'S GOOD, THAT'S VALID, BUT, OH, NO, I'M GOING TO REJECT THE RATE OF RETURN BECAUSE ARANCA WAS LIED TO. YOU CAN'T HAVE IT BOTH WAYS.

THE COURT: OKAY.

MS. WALSH: OKAY. AND THEN JUST A COUPLE OF POINTS ON MR. MURDOCH.

SO I DON'T THINK THAT NATALIE RAVITZ IS ANALOGOUS TO LISA PETERSON AT ALL.

1 MS. RAVITZ EXPRESSED IN HER S.E.C. TESTIMONY THAT SHE
2 THOUGHT THAT THE HISTORICAL REVENUE WAS LOW, AND SHE DIDN'T
3 NECESSARILY THINK IT WAS A GOOD INVESTMENT TO MAKE.

4 IT WAS MR. MURDOCH WHO PULLED THE TRIGGER ON THE
5 INVESTMENT. HE WAS THE DECISION-MAKER. AND WE HAVE NOTHING IN
6 THE RECORD, ZERO FROM HIM IN THE FORM OF TESTIMONY OR IN THE
7 FORM OF A VICTIM IMPACT STATEMENT SAYING WHAT HE RELIED ON IN
8 MAKING THAT DECISION. FOR THAT REASON, I THINK THE COURT HAS
9 TO REJECT HIM AS AN INVESTOR TO BE INCLUDED IN THE GROUP.

10 THE COURT: OKAY. THANK YOU.

11 MS. WALSH: AND THEN FINALLY, THERE WAS SOMETHING
12 THAT MR. LEACH SAID THAT WAS INTERESTING ABOUT, WELL,
13 MR. WEINGUST IS NOT PROVIDING THE COURT WITH HIS OWN VALUATION.
14 HE'S NOT SAYING, HEY, THIS IS WHAT IT SHOULD BE. THAT'S TRUE.

15 IT'S THE GOVERNMENT'S BURDEN TO PROVE LOSS. IT'S NOT THE
16 DEFENSE'S BURDEN, AND MR. WEINGUST HASN'T PROVIDED THE COURT
17 WITH WHAT RATE OF RETURN OR ANYTHING ELSE OF VALUE, YOU KNOW, A
18 FULSOME VALUATION. HE DIDN'T LOOK AT AS MANY DOCUMENTS PERHAPS
19 AS MR. SABA, BUT THE BURDEN IS NOT ON US TO ESTABLISH LOSS.

20 WHAT HE DID DO, AND I THINK THIS IS THE WHOLE POINT OF
21 THIS EXERCISE, HE LOOKED AT MR. SABA'S REPORT AS AN EXPERT, AND
22 HE NOTICED THAT THERE WERE SOME VERY SERIOUS ERRORS IN EACH
23 APPROACH, AND THE INCOME APPROACH AND THE ASSET APPROACH.
24 WE'VE GONE OVER THOSE TODAY.

25 THE MAGNITUDE IN TERMS OF VALUING THERANOS AND THEN

11:39AM 1 ASCERTAINING LOSS, THE MAGNITUDE OF THOSE ERRORS ARE SO GREAT
11:39AM 2 AND THEY RESULT IN SUCH SWINGS IN VALUE AND LOSS, THAT THE
11:39AM 3 COURT SHOULD NOT RELY ON THE REPORT IN FASHIONING A REASONABLE
11:39AM 4 LOSS AMOUNT.

11:39AM 5 THE COURT: OKAY. THANK YOU.

11:39AM 6 AND I THINK YOU'RE RIGHT, HIS REPORTS ARE CRITICAL,
11:39AM 7 THEY'RE CRITICISMS. THEY'RE LOOKING AT THE SABA REPORT,
11:40AM 8 CRITICIZING SPECIFIC FINDINGS, PROTOCOLS THAT WERE ENGAGED AS
11:40AM 9 MR. REIFF -- IS IT MR. REIFF?

11:40AM 10 MS. WALSH: REIFF.

11:40AM 11 THE COURT: REIFF. HE DID THE SAME THING. BUT
11:40AM 12 NEITHER OF THEM COME UP WITH ANY FACTOR.

11:40AM 13 I THINK MR. REIFF ACTUALLY SAYS, WELL, HE TALKS ABOUT THE
11:40AM 14 SABA REPORT AND SUGGESTS, WELL, IT'S REASONABLE, BUT HE DOES
11:40AM 15 CRITICIZE IT NONETHELESS.

11:40AM 16 MS. WALSH: YEAH. AND I THINK WHAT HE SAYS IS THE
11:40AM 17 OCP METHOD OF ALLOCATION IS A COMMONLY USED METHOD, FINE, BUT
11:40AM 18 IN THESE CIRCUMSTANCES THERE ARE TWO FACTORS THAT ARE
11:40AM 19 INCREDIBLY SPECULATIVE.

11:40AM 20 THE COURT: AND IT WAS HELPFUL -- THANK YOU. AND I
11:40AM 21 WANT TO ASK MR. LEACH ABOUT ANYTHING HE WANTS TO SAY,
11:40AM 22 PARTICULARLY ABOUT THE ARANCA ISSUE.

11:40AM 23 BUT I DID LOOK AT THE RESUMES, THE CV'S OF THE EXPERTS
11:40AM 24 HERE AND MANY OF THEM, IT SEEMED, THAT HAD TESTIFIED IN
11:40AM 25 BUSINESS DISPUTES AND FAMILY LAW MATTERS. THERE WERE MANY OF

11:41AM 1 THEM -- I THINK YOUR EXPERTS TESTIFIED IN FAMILY LAW CASES
11:41AM 2 WHERE THERE WAS A DISSOLUTION OF THE COMMUNITY, I SUPPOSE, AND
11:41AM 3 THERE'S A DISAGREEMENT ABOUT THOSE ASSETS AND THINGS.

11:41AM 4 THERE WEREN'T TOO MANY SPECIFIC CRIMINAL CASES THAT WERE
11:41AM 5 NOTED IN THE CV'S OF THE PARTIES. I JUST NOTE THAT.

11:41AM 6 MR. LEACH.

11:41AM 7 MR. LEACH: JUST BRIEFLY ON THE ARANCA POINT.
11:41AM 8 YOUR HONOR, THIS EXIT DATE ONLY COMES INTO PLAY IN THE ASSET
11:41AM 9 APPROACH, WHICH I KNOW THE COURT DID NOT ADOPT.

11:41AM 10 AND I THINK THE POINT HERE IS, NOT TO BE CRITICAL OF
11:41AM 11 ARANCA, BUT TO TAKE A HARD LOOK AT WHAT INFORMATION ARANCA
11:41AM 12 ACTUALLY HAS AND WHETHER JUDGMENTS IT'S MAKING IN TERMS OF THE
11:41AM 13 FOUR YEAR HORIZON ARE REASONABLE OR NOT, NOT JUST WHOLLY
11:42AM 14 DISCOUNT IT, BUT TO BRING A CRITICAL EYE TO IT.

11:42AM 15 AND IT'S NOT SO MUCH THE ARANCA REPORT AS IT IS THE
11:42AM 16 FINANCIAL FORECAST THAT WERE THE SUBJECT OF MULTIPLE DAYS OF
11:42AM 17 TESTIMONY IN THIS CASE, AND WHETHER THOSE ARE REASONABLE OR
11:42AM 18 NOT, AND I THINK ANYBODY LOOKING AT THEM, PARTICULARLY WITH
11:42AM 19 INFORMATION NOW, HAS TO SEE THAT THESE ARE PIE IN THE SKY
11:42AM 20 PROJECTIONS THAT NEED SOME FORM OF DISCOUNT, WHATEVER ARANCA
11:42AM 21 THOUGHT OR WAS TOLD.

11:42AM 22 THE COURT: ANYTHING FURTHER?

11:42AM 23 MR. LEACH: NO, YOUR HONOR. THANK YOU.

11:42AM 24 MS. WALSH: JUST ONE POINT BASED ON WHAT MR. LEACH
11:42AM 25 SAID.

11:42AM 1 THE COURT: SURE.

11:42AM 2 MS. WALSH: I BELIEVE THE HOLDING PERIOD BEFORE THE
11:42AM 3 LIQUIDITY EVENT IS SOMETHING THAT MR. SABA ASCERTAINED IN
11:42AM 4 CONNECTION WITH THE ALLOCATION OF VALUE, NOT WITH THE ASSET
11:42AM 5 APPROACH.

11:42AM 6 SO YOU HAVE THE PAPERS AND YOU'LL SEE, BUT THAT'S MY
11:42AM 7 UNDERSTANDING. SO IT IS IMPORTANT BECAUSE EVEN IN THE INCOME
11:42AM 8 APPROACH YOU'RE GOING TO APPLY THE ALLOCATION METHOD TO THAT
11:42AM 9 APPROACH TO FIGURE OUT WHAT THE NUMBERS ARE FOR EACH INVESTOR.

11:42AM 10 THE COURT: OKAY. ANYTHING FURTHER ON LOSS
11:43AM 11 CALCULATION FROM EITHER SIDE?

11:43AM 12 MS. WALSH: NO, YOUR HONOR.

11:43AM 13 THE COURT: MR. LEACH?

11:43AM 14 MR. LEACH: NO, YOUR HONOR. THANK YOU.

11:43AM 15 THE COURT: WERE YOU ALSO SPEAKING FOR THAT VICTIM
11:43AM 16 COUNT, WERE YOU DOING THAT, MS. WALSH?

11:43AM 17 MS. WALSH: YES, YOUR HONOR. I THOUGHT I ADDRESSED
11:43AM 18 IT IN TERMS OF LOSS CAUSATION AND MURDOCH IS ONE OF THE
11:43AM 19 EXAMPLES.

11:43AM 20 THE COURT: ANYTHING FURTHER YOU WANT TO SAY ABOUT
11:43AM 21 THAT AS FAR AS THE GUIDELINE CALCULATION?

11:43AM 22 MS. WALSH: WE REST ON OUR PAPERS.

11:43AM 23 THE COURT: ALL RIGHT. OKAY.

11:43AM 24 ANYTHING FURTHER ABOUT THAT?

11:43AM 25 MR. LEACH: THE ONLY POINT I WOULD MAKE THERE,

11:43AM 1 YOUR HONOR, IS THAT THERE WERE SEVEN INVESTORS WHO ACTUALLY
11:43AM 2 TESTIFIED IN MR. BALWANI'S TRIAL. IN ADDITION, THERE ARE THE
11:43AM 3 INVESTORS WHO WE PROFFERED INFORMATION ABOUT, SUCH AS
11:43AM 4 MR. MURDOCH, PEER VENTURES, SOME OF THE ONES THAT THE COURT
11:43AM 5 FOUND IN THE HOLMES SENTENCING.

11:43AM 6 IN ADDITION TO THAT, YOU KNOW, THERE ARE PATIENT VICTIMS
11:44AM 7 HERE. THREE OF THEM TESTIFIED IN THE TRIAL. SO I'M NOT SURE
11:44AM 8 HOW THERE CAN BE A SCENARIO WHERE THERE WERE FEWER THAN TEN
11:44AM 9 VICTIMS MET. THAT IS SOMETHING THAT BECAUSE THE COURT DID NOT
11:44AM 10 CONSIDER ACQUITTED CONDUCT IN THE HOLMES SENTENCING IS
11:44AM 11 SOMETHING DIFFERENT HERE. I JUST WANTED TO MAKE SURE THAT WE
11:44AM 12 ADDRESSED THAT POINT.

11:44AM 13 THE COURT: THANK YOU. WELL, LET ME TALK ABOUT THE
11:44AM 14 OTHER GUIDELINE ENHANCEMENTS, IF YOU WILL NOW.

11:44AM 15 MR. LEACH: SURE, YOUR HONOR.

11:44AM 16 MS. WALSH: AND MR. COOPERSMITH IS GOING TO ADDRESS
11:44AM 17 THOSE.

11:44AM 18 THE COURT: SURE.

11:44AM 19 MS. WALSH: WE'LL DO ANOTHER SWITCH.

11:44AM 20 THE COURT: SURE. OKAY. AND I THINK WHAT WE'LL DO
11:44AM 21 IS GO THROUGH THESE OTHER TWO ENHANCEMENTS, WE'LL TAKE A BREAK,
11:44AM 22 AND THEN WE'LL COME BACK AND FINISH UP OUR GUIDELINE
11:44AM 23 CALCULATION AND THEN MOVE ON.

11:44AM 24 MR. LEACH: THANK YOU, YOUR HONOR.

11:44AM 25 THE COURT: I'M NOW AT OBJECTION TWENTY-FOUR, WHICH

11:44AM 1 IS THE AGGRAVATING ROLE, AND THIS IS THE 4 POINT ENHANCEMENT
11:45AM 2 FOR ORGANIZER OR LEADER UNDER 3B1.1 (A), AND EVERYBODY KNOWS I
11:45AM 3 DID NOT FIND THAT IN THE COMPANION CASE.

11:45AM 4 MR. COOPERSMITH, DID YOU WANT TO BE HEARD ON THIS?

11:45AM 5 MR. COOPERSMITH: YOUR HONOR, I'M HAPPY TO BE HEARD.
11:45AM 6 TO TRY TO MAKE THIS AS EFFICIENT AS POSSIBLE, IF THE COURT IS
11:45AM 7 INCLINED TO APPLY THAT IN THE CASE OF MR. BALWANI, I CERTAINLY
11:45AM 8 WOULD HAVE A LOT TO SAY. IF THE COURT IS NOT INCLINED, I WILL
11:45AM 9 HAVE A LOT LESS TO SAY.

11:45AM 10 BUT I'LL SAY THIS IN BRIEF IS THAT AS I UNDERSTAND THE
11:45AM 11 COURT'S RULING IN ELIZABETH HOLMES'S CASE, THE COURT DID NOT
11:45AM 12 APPLY IT BECAUSE UNDER THE HOLDEN CASE IN THE NINTH CIRCUIT, IN
11:45AM 13 ORDER TO BE AN ORGANIZER OR LEADER, TO GET ANY OF THE
11:45AM 14 ADJUSTMENTS, WHETHER IT'S 2 POINTS OR 4 POINTS UNDER 3B1.1, YOU
11:45AM 15 WOULD HAVE TO BE DIRECTING, ORGANIZING, LEADING ANOTHER
11:45AM 16 CRIMINAL PARTICIPANT.

11:46AM 17 AND AS THE COURT NOTED IN THE HOLMES SENTENCING, THE ONLY
11:46AM 18 CRIMINAL PARTICIPANTS AT ISSUE HERE ALLEGEDLY ARE MR. BALWANI
11:46AM 19 AND MS. HOLMES.

11:46AM 20 THE COURT: WELL, THE JURY FOUND THAT.

11:46AM 21 MR. COOPERSMITH: YES, I UNDERSTAND THAT. AND FOR
11:46AM 22 PURPOSES OF THE SENTENCING, WE OBVIOUSLY ARE RESPECTING THE
11:46AM 23 VERDICT AND THAT'S WHY WE'RE HERE.

11:46AM 24 BUT WITH REGARD TO THE CRIMINAL PARTICIPANTS, WE HAVE
11:46AM 25 MS. HOLMES AND MR. BALWANI.

1 THE COURT DID NOT BELIEVE THAT MS. HOLMES WAS LEADING
2 MR. BALWANI, ALTHOUGH THERE ARE INDICATIONS IN THIS CASE THAT
3 THAT IS THE CASE, SHE WAS THE CEO, AND SHE HAD THE ABILITY TO
4 FIRE HIM AND SO FORTH.

5 THE COURT: RIGHT. BUT THE JURY FOUND WHAT THEY DID
6 AND WE'RE HERE TO DETERMINE WHETHER OR NOT THIS COURT IN ITS
7 SENTENCING DECISION SHOULD APPLY A LEADERSHIP ROLE TO YOUR
8 CLIENT.

9 I DIDN'T IN THE HOLMES CASE. AND MAYBE WE SHOULD -- I
10 DON'T MEAN TO INTERRUPT YOU, BUT MAYBE I'LL TAKE YOUR
11 INVITATION TO SAY, WELL, IF YOU'RE NOT GOING TO GIVE IT, I
12 DON'T HAVE ANYTHING TO SAY, JUDGE.

13 SO LET'S TURN TO MR. LEACH.

14 MR. LEACH, SHOULD I GIVE THIS? SHOULD THIS APPLY?

15 MR. LEACH: I WAS HERE WHEN YOUR HONOR ELECTED NOT
16 TO GIVE IT. SO I RESPECT THE COURT'S RULING, AND I DON'T WANT
17 TO REPEAT OURSELF, AND WE'RE NOT WRITING ON A BLANK SLATE HERE.

18 THE COURT: SURE.

19 MR. LEACH: THE ONLY POINT I WOULD MAKE -- AND WE DO
20 WANT TO PRESERVE OUR ARGUMENTS ON THIS.

21 THE COURT: YES, OF COURSE.

22 MR. LEACH: THE ONLY NUANCE I WOULD POINT OUT IS
23 THERE'S A COMPLICATED RELATIONSHIP BETWEEN ELIZABETH HOLMES AND
24 SUNNY BALWANI, AND I THINK THE TEXTS REVEAL AND THE EVIDENCE
25 REVEALS THAT THERE WERE TIMES PARTICULARLY WHEN YOU LOOK AT IT

11:47AM 1 COUNT BY COUNT WHERE MR. BALWANI WAS LEADING AND WHERE
11:47AM 2 MS. HOLMES WAS LEADING.

11:47AM 3 TAKE, FOR EXAMPLE, PFM, MR. GROSSMAN, THERE WAS AN INITIAL
11:47AM 4 MEETING BETWEEN MS. HOLMES AND MR. BALWANI AND THEN MUCH, IF
11:47AM 5 NOT ALL, OF THE REMAINING ENGAGEMENT WAS BETWEEN MR. BALWANI
11:47AM 6 AND MR. GROSSMAN. AND I THINK THERE'S A WAY TO LOOK AT THOSE
11:47AM 7 FACTS AND SAY AT LEAST ON THAT COUNT, MR. BALWANI IS LEADING IN
11:47AM 8 THAT SITUATION.

11:47AM 9 NOW, THAT'S NOT TO SAY THAT THEY DON'T HAVE
11:47AM 10 RESPONSIBILITY, THAT'S NOT TO SAY ONE IS CONTROLLING THE OTHER,
11:48AM 11 BUT IF YOU LOOK AT IT IN PARTICULAR SITUATIONS, THERE ARE TIMES
11:48AM 12 WHEN MS. HOLMES DEFERS TO HIM AND THERE ARE TIMES WHEN HE
11:48AM 13 DEFERS TO HER.

11:48AM 14 AND THERE'S JUST SOMETHING ODD ABOUT THIS CASE WHERE YOU
11:48AM 15 HAVE THE CEO OF A COMPANY AND THE COO OF A COMPANY AND NEITHER
11:48AM 16 ONE OF THEM IS THE LEADER.

11:48AM 17 BUT BEYOND THAT, I THINK THE COURT UNDERSTANDS THOSE
11:48AM 18 ISSUES. IT WAS A COMPLICATED RELATIONSHIP. WE MADE THE
11:48AM 19 ARGUMENT THAT IT WAS OTHERWISE EXTENSIVE. THE COURT WENT THE
11:48AM 20 OTHER WAY ON THAT POINT, AND WE UNDERSTAND THAT.

11:48AM 21 SO THOSE ARE THE ONLY NUANCES THAT I WANTED TO POINT OUT
11:48AM 22 AND WITH THAT I'LL SUBMIT.

11:48AM 23 THE COURT: THANK YOU. AND THEY'RE APPROPRIATE. I
11:48AM 24 THINK ALL OF US AGREE THE CASE WAS COMPLICATED AND NUANCED IN
11:48AM 25 MANY WAYS, AND WE ALSO ARE GUIDED BY THE CASES THAT SAY THAT

11:48AM 1 THERE CAN BE CO-LEADERS, AND IF THERE'S CO-LEADERS,

11:48AM 2 CO-CAPTAINS, THERE ISN'T A CAPTAIN DESIGNATED PER SE.

11:49AM 3 ANYTHING ELSE YOU WANT TO SAY ABOUT THIS, MR. COOPERSMITH?

11:49AM 4 MR. COOPERSMITH: JUST BRIEFLY, YOUR HONOR.

11:49AM 5 WE UNDERSTAND UNDER THE HOLDEN CASE AND IF THEY ARE IN
11:49AM 6 FACT CO-LEADERS, THAT THE ADJUSTMENT WOULD NOT BE APPLIED TO
11:49AM 7 MR. BALWANI JUST LIKE IT WAS NOT APPLIED TO MS. HOLMES.

11:49AM 8 BUT I WILL SAY, AND THIS MAY BE COMING UP IN REMARKS
11:49AM 9 RELEVANT TO OTHER PORTIONS OF THE SENTENCING, YOUR HONOR, WE
11:49AM 10 REJECT THE IDEA THAT THEY WERE CO-LEADERS.

11:49AM 11 THE GOVERNMENT SAID OVER AND OVER AGAIN IN VARIOUS
11:49AM 12 CONTEXTS, INCLUDING THE SENTENCING MEMO IN MS. HOLMES'S CASE,
11:49AM 13 THAT MS. HOLMES WAS ULTIMATELY RESPONSIBLE. SHE WAS THE CEO,
11:49AM 14 SHE WAS THE FACE OF THERANOS, SHE HAD THE ABILITY TO FIRE
11:49AM 15 MR. BALWANI.

11:49AM 16 SO WE DON'T AGREE WITH THAT.

11:49AM 17 THE COURT: WELL, ALL OF THAT WAS TRUE.

11:49AM 18 MR. COOPERSMITH: ALL OF THAT WAS TRUE, YEAH.

11:49AM 19 THE COURT: RIGHT.

11:49AM 20 MR. COOPERSMITH: BUT FOR PURPOSES OF THIS GUIDELINE
11:49AM 21 ENHANCEMENT, IF THEY ARE CO-LEADERS, EVEN IF THAT WERE THE
11:49AM 22 CASE, THESE GUIDELINE ADJUSTMENTS WOULD NOT BE APPLIED. AND,
11:49AM 23 OF COURSE, IT CERTAINLY WOULDN'T BE APPLIED IF WHAT WE SAY IS
11:49AM 24 RIGHT, IT WAS ACTUALLY MS. HOLMES WHO WAS THE LEADER OF THIS
11:49AM 25 COMPANY AND OF MR. BALWANI.

11:49AM 1 SO I THINK I'LL STOP THERE UNLESS THE COURT HAS MORE
11:50AM 2 QUESTIONS. WE DON'T THINK THE GUIDELINE ADJUSTMENT SHOULD BE
11:50AM 3 APPLIED.

11:50AM 4 THE COURT: OKAY. THANK YOU.

11:50AM 5 THANK YOU. LET'S TURN TO THE 2B1.1(B)(16), WHICH IS THE
11:50AM 6 SERIOUS BODILY INJURY ENHANCEMENT. THE GOVERNMENT IS URGING
11:50AM 7 THIS OR SUGGESTS THAT THE COURT SHOULD APPLY THIS.

11:50AM 8 I DONT THINK PROBATION -- DID YOU RECOMMEND THIS,
11:50AM 9 MS. GOLDSBERRY?

11:50AM 10 PROBATION OFFICER: NOT IN THE FINAL REPORT,
11:50AM 11 YOUR HONOR.

11:50AM 12 THE COURT: ALL RIGHT. THANK YOU.

11:50AM 13 SO, MR. LEACH, WHAT SHOULD I KNOW ABOUT THIS?

11:50AM 14 MR. LEACH: THERE'S A SIGNIFICANT DIFFERENCE BETWEEN
11:50AM 15 MS. HOLMES AND MR. BALWANI ON THIS POINT, YOUR HONOR, AND THAT
11:50AM 16 IS MR. BALWANI WAS CONVICTED OF A CONSPIRACY TO DEFRAUD
11:50AM 17 PATIENTS ABOUT THEIR BLOOD TESTS AND FOR FOUR INDIVIDUAL COUNTS
11:50AM 18 OF WIRE FRAUD WITH RESPECT TO THREE PATIENTS WHO TESTIFIED IN
11:50AM 19 AN AD TO THE MEDIA.

11:50AM 20 SO WE HAVE A FINDING BY THE JURY THAT MR. BALWANI ENGAGED
11:50AM 21 IN A CONSPIRACY TO PROVIDE FALSE AND MISLEADING INFORMATION TO
11:51AM 22 PAYING PATIENTS WHO ARE GOING TO RELY ON THESE BLOOD TESTS.
11:51AM 23 AND THERE'S A CASE THAT I KNOW THE COURT IS -- AND WE THINK
11:51AM 24 THIS FACTUAL SCENARIO FOUND BY THE JURY FALLS SQUARELY WITHIN
11:51AM 25 NINTH CIRCUIT CASE LAW.

1 I THINK THE JOHANSSON CASE, WHICH WE CITE --

2 THE COURT: 249 FED. 3D?

3 MR. LEACH: YES, YOUR HONOR. YOU'RE FASTER THAN I
4 AM.

5 I THINK THAT'S VERY INSTRUCTIVE. I MEAN, THAT'S WHERE
6 THERE WAS FALSIFICATION OF REPORTS ABOUT DRIVERS MEETING OR NOT
7 MEETING THE LIMIT, THE SLEEPING LIMIT BEFORE THEY HAD TO BE
8 TAKEN OFF THE ROAD, AND THOSE DOCUMENTS WERE FALSIFIED. AND
9 THE NINTH CIRCUIT THERE FOUND THAT THERE WERE SUFFICIENT FACTS
10 TO SAY THAT THAT SCENARIO IS AN OFFENSE WITH A CONSCIOUS OR
11 RECKLESS DISREGARD OF SERIOUS BODILY INJURY.

12 I FAIL TO SEE THE DISTINCTION BETWEEN OUR TWO SITUATIONS
13 HERE. THERE WAS AMPLE EVIDENCE IN THE RECORD THAT THERANOS WAS
14 PROVIDING FALSE AND MISLEADING BLOOD TESTS AND THAT MR. BALWANI
15 WAS CONSPIRING TO DO THAT TO PATIENTS.

16 THE JURY FOUND THAT HE ACTED WILLFULLY WITH RESPECT TO
17 THAT AND WITH INTENT TO DEFRAUD.

18 THE RESPONSE I HEAR FROM MR. COOPERSMITH IS, WELL,
19 MR. BALWANI WAS TRYING TO FIX PROBLEMS AS THEY AROSE, AND IF HE
20 WOULD SEE THIS, HE REACTED TO THAT.

21 THAT MIGHT BE TRUE OR THAT MIGHT NOT BE TRUE ACCORDING TO
22 THE EVIDENCE, BUT IT DOESN'T SEEM TO US THAT THAT'S SOMETHING
23 THAT YOU CAN SAY IN LIGHT OF THE VERDICT, AND I THINK IT'S
24 IMPORTANT THAT COUNT TWELVE GOES TO THE TIME PERIOD AUGUST OF
25 2015 LATE INTO THE CONSPIRACY.

1 SO WHAT MR. BALWANI WAS OR WAS NOT DOING I'M NOT SURE IS
2 PARTICULARLY RELEVANT, AND OUR BRIEF LAYS FORTH SOME OF THE
3 FACTS IN TERMS OF THE CONCERNS THAT ERIKA CHEUNG WAS RAISING,
4 THE CONCERNS THAT TYLER SHULTZ WAS RAISING, THE CONCERNS THAT
5 DR. PANDORI WAS RAISING WHEN HE WAS TOLD BY MR. BALWANI WHEN HE
6 SAYS WE SHOULD STOP DOING THE EDISON, WE'RE NOT GOING THAT.
7 THERE'S AMPLE EVIDENCE IN THE RECORD WHERE MR. BALWANI IS
8 ADVISED OF PROBLEMS AND YET THE TESTS CONTINUE TO BE ISSUED.

9 AND I THINK ONE POINT WE MENTION IN OUR BRIEF IS THERE IS
10 AN INSTANCE WHERE DANIEL YOUNG IS RAISING SOME CONCERNS HE HAS
11 WITH TESTS, AND THE DEFENSE RAISED A LOT ABOUT DR. YOUNG AND
12 HIM NOT BEING CALLED IN THIS CASE, BUT THERE'S AN EMAIL FROM
13 HIM THAT SAID -- WHERE DR. YOUNG IS RAISING SOME OF THESE
14 CONCERNS, EVEN THE INDIVIDUALS THAT THE DEFENSE WAS POINTING TO
15 AS THEIR GO-TO PERSON FOR THEIR PROBLEMS. AND MR. BALWANI'S
16 RESPONSE TO THAT IS TELLING. HE'S TOLD BY DR. YOUNG THAT THERE
17 ARE PROBLEMS IN THE FALL OF 2014, AND HE FORWARDS THAT TO
18 MS. HOLMES AND HE SAYS, "ALWAYS ANOTHER STUDY AFTER THE FACT."

19 WHAT DOES THAT MEAN? THAT MEANS THAT HE KNOWS, TIME AND
20 TIME AGAIN, THERANOS IS GOING TO MARKET WITH SOMETHING BASED ON
21 A VALIDATION PROCESS THAT TURNS OUT NOT TO BE WORKING, ANOTHER
22 STUDY AFTER THE FACT.

23 DR. YOUNG IS PROPOSING, WELL, WE ALREADY WENT TO MARKET
24 WITH THIS PROBLEM, IT'S NOT WORKING. LET'S GO DO ANOTHER STUDY
25 TO TRY TO FIGURE OUT WHAT THE ISSUE IS. AND THAT'S NOT

11:54AM 1 HAPPENING WITH ONE ASSAY IN AUGUST OF 2014, THAT'S HAPPENING IN
11:54AM 2 MULTIPLE ASSAYS, AND MR. BALWANI KNOWS THIS. AND ALL OF THIS
11:54AM 3 IS BEFORE THE SITUATION WHERE DR. ROSENDORFF LEAVES AFTER
11:54AM 4 TELLING MS. HOLMES IN A COMMUNICATION THAT GOES TO MR. BALWANI
11:54AM 5 THAT HE'S BEING ASKED TO VOUCH FOR TESTS THAT HE'S NOT
11:54AM 6 COMFORTABLE WITH, WHERE MR. BALWANI GOES TO THE LAB AND SAYS
11:54AM 7 IT'S AN F'ING DISASTER.

11:54AM 8 SO THERE IS BEYOND A REASONABLE DOUBT EVIDENCE THAT
11:54AM 9 MR. BALWANI CONSPIRED TO DEFRAUD PATIENTS TO GIVE THEM FALSE
11:54AM 10 AND UNRELIABLE INFORMATION, AND THAT FACT COMPELS THE
11:54AM 11 FINDING -- A FINDING UNDER THIS GUIDELINE THAT THE OFFENSE
11:55AM 12 INVOLVED A CONSCIOUS OR A KNOWING RISK OF SERIOUS BODILY
11:55AM 13 INJURY.

11:55AM 14 I JUST DON'T THINK WHATEVER HE IS DOING, YOU KNOW, IN
11:55AM 15 RESPONSE TO INDIVIDUAL ASSAYS MATTERS AT THE END OF THE DAY IN
11:55AM 16 LIGHT OF THE JURY FINDING.

11:55AM 17 SO FOR THOSE REASONS WE THINK THIS ENHANCEMENT IS
11:55AM 18 APPROPRIATELY APPLIED.

11:55AM 19 THE COURT: THANK YOU.

11:55AM 20 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:55AM 21 THIS IS ONE THAT THE PROBATION OFFICE GOT RIGHT BY NOT
11:55AM 22 RECOMMENDING THIS ADJUSTMENT, AND IT'S ALSO ONE THAT THE COURT
11:55AM 23 GOT RIGHT IN MS. HOLMES'S CASE. LET ME ADDRESS MR. LEACH'S
11:55AM 24 ARGUMENTS AND SAY A FEW OTHER THINGS.

11:55AM 25 FIRST OF ALL, WE'RE TALKING ABOUT GUIDELINE ADJUSTMENT FOR

1 CONSCIOUS RISK OF CREATING -- CONSCIOUS CREATION OF A RISK OF
2 SERIOUS BODILY INJURY OR DEATH.

3 THE LAW ON THAT, JUST TO START WITH THAT, IS IT HAS TO BE
4 EITHER KNOWING OR RECKLESS, WHICH UNDER THE NINTH CIRCUIT
5 STANDARD, AND THIS IS ON PAGE 33 AND 34 OF OUR SENTENCING
6 MEMORANDUM, IT HAS TO BE RECKLESS. IT IS SO OUTSIDE OF THE
7 PALE THAT THE DEFENDANT MUST ACTUALLY KNOW. IT'S AS CLOSE AN
8 ANALOGY THAT YOU COULD POSSIBLY GET.

9 SO IN THIS CASE WE'VE GOT A JURY VERDICT, AS MR. LEACH
10 SAID, AND THE VERDICT WAS FINDING MR. BALWANI GUILTY OF PATIENT
11 COUNTS AND OF CONSPIRACY. THAT IS TRUE, AND WE'RE NOT ARGUING
12 THAT AGAIN TODAY, OF COURSE.

13 BUT THE JURY VERDICT IS A GENERAL VERDICT. AND AS WE
14 POINTED OUT IN OUR PAPERS, WE DON'T KNOW WHY THE JURY DECIDED
15 TO CONVICT MR. BALWANI ON THAT COUNT, BUT BY THAT SAME TOKEN,
16 WE DON'T KNOW WHY THE JURY DECIDED NOT TO CONVICT MS. HOLMES ON
17 THOSE SAME COUNTS, EVEN THOUGH THE GOVERNMENT'S PRESENTATION
18 WAS VIRTUALLY IDENTICAL IN BOTH CASES.

19 AND THE GOVERNMENT ARGUED IN MOTION PRACTICE AND IN
20 CLOSING ARGUMENT THAT ONE OF THE THEORIES OF WHY MR. BALWANI
21 WAS GUILTY OF THESE PATIENT COUNTS AND CONSPIRACY WAS THAT
22 PATIENTS HAD BEEN TOLD THERANOS LABORATORY RESULTS ARE MORE
23 ACCURATE, THEY'RE BETTER THAN OTHER COMPETITORS, YOU SHOULD GO
24 TO THERANOS. THEY ARGUED THAT. AND FOR ALL WE KNOW BASED ON
25 THE GENERAL VERDICT, THE JURY WOULD HAVE LATCHED ON TO THAT AND

11:57AM 1 SAID, OKAY, THAT'S A MISREPRESENTATION THAT WE'RE GOING TO FIND
11:57AM 2 GUILT ON.

11:57AM 3 SO THE VERDICT DOESN'T HELP US HERE IN TERMS OF WHETHER
11:57AM 4 THIS GUIDELINE ADJUSTMENT SHOULD BE APPLIED.

11:57AM 5 AND WHEN WE TALK ABOUT SENTENCING IS THE PROVINCE OF THE
11:57AM 6 COURT, NOT THE JURY, AND YOUR HONOR HAS TO DECIDE THESE
11:57AM 7 DIFFICULT QUESTIONS.

11:57AM 8 I WENT BACK TO THIS COURT'S RULING ON OUR RULE 29 MOTION,
11:57AM 9 AND THAT'S DOCKET 1625, AND WHEN YOU LOOK AT THAT, ESPECIALLY
11:57AM 10 PAGE 9 AND 10, THERE'S A LOT OF POINTS THAT THIS COURT MADE
11:57AM 11 ABOUT WHY MS. HOLMES KNEW FULL WELL, ACCORDING TO THE COURT'S
11:58AM 12 OPINION, THAT THE LABORATORY HAD ALL OF THESE ISSUES.

11:58AM 13 SO THE SAME EVIDENCE APPLIED TO MS. HOLMES. FOR EXAMPLE,
11:58AM 14 IF THIS IS REALLY THE CASE, MR. LEACH POINTS OUT THAT
11:58AM 15 MR. BALWANI WROTE AN EMAIL TO MS. HOLMES AND SAID "ALWAYS
11:58AM 16 ANOTHER STUDY AFTER THE FACT."

11:58AM 17 WELL, MS. HOLMES GOT THAT EMAIL. SO SHE HAS THE SAME
11:58AM 18 KNOWLEDGE AS MR. BALWANI IF THAT IS AN ISSUE.

11:58AM 19 WE DON'T THINK THAT'S WHAT IT MEANT. BUT GIVEN
11:58AM 20 MR. LEACH'S ARGUMENT, WE DON'T UNDERSTAND HOW IT COULD BE
11:58AM 21 APPLIED TO MR. BALWANI AND NOT MS. HOLMES. AND THE COURT, OF
11:58AM 22 COURSE, MADE THAT RULING IN MS. HOLMES'S CASE.

11:58AM 23 BY THE SAME TOKEN, IF THE TEXT MESSAGE "NORMANDY IS AN
11:58AM 24 F'ING DISASTER" IS WHAT MR. LEACH THINKS IT IS, SHE HAD THAT
11:58AM 25 SAME TEXT MESSAGE. THE SAME EVIDENCE APPLIED TO HER AS IT WAS

11:58AM 1 TO MR. BALWANI, AND SHE WASN'T GIVEN THE ADJUSTMENT. SO OUT OF
11:58AM 2 BASIC FAIRNESS, IT SHOULDN'T APPLY TO MR. BALWANI.

11:58AM 3 AGAIN, WE DON'T NEED TO DEBATE THIS NOW, BUT WE DON'T
11:59AM 4 BELIEVE THAT TEXT MESSAGE MEANT WHAT THE GOVERNMENT SAID, BUT I
11:59AM 5 DON'T NEED TO GO INTO THAT FOR THIS PURPOSE.

11:59AM 6 SO WHY SHOULDN'T THE GUIDELINE ADJUSTMENT BE APPLIED? AND
11:59AM 7 THERE ARE A LOT OF REASONS.

11:59AM 8 FIRST OF ALL -- AND I WANT TO JUST HAND UP SOMETHING TO
11:59AM 9 THE COURT IF I CAN WITH YOUR PERMISSION, YOUR HONOR, AND I'LL
11:59AM 10 GIVE IT TO THE GOVERNMENT, TOO. BUT THIS HAD TO DO WITH THE
11:59AM 11 BLOOD TESTING THAT MR. BALWANI ARRANGED FOR HIS MOTHER TO
11:59AM 12 HAVE --

11:59AM 13 THE COURT: YOU DON'T HAVE TO PASS THAT UP. I'VE
11:59AM 14 SEEN IT.

11:59AM 15 MR. COOPERSMITH: I DON'T THINK YOU'VE SEEN IT.

11:59AM 16 THE COURT: YOU PUT SOMETHING IN THE RECORD OR AT
11:59AM 17 LEAST ONE OF THE SUBMISSIONS WERE RELATIVE'S TESTS, BLOOD
11:59AM 18 TESTS.

11:59AM 19 MR. COOPERSMITH: YES, YOUR HONOR.

11:59AM 20 THE COURT: AND IF YOU'RE OFFERING THIS FOR AN
11:59AM 21 ARGUMENT TO SAY WOULD HE DO THIS TO A RELATIVE? WOULD HE ALLOW
11:59AM 22 A RELATIVE TO TAKE A TEST IF HE HAD CONSCIOUS KNOWLEDGE? IS
11:59AM 23 THAT WHAT THE PURPOSE OF THIS IS?

11:59AM 24 MR. COOPERSMITH: YES, YOUR HONOR.

11:59AM 25 THE COURT: I UNDERSTAND THAT.

1 MR. COOPERSMITH: WHAT I'LL SAY -- AND I WON'T HAND
2 IT UP. BUT WHAT I WILL TELL THE COURT IS THAT WE LOOKED AT THE
3 BLOOD TESTS THAT MR. BALWANI'S MOTHER ACTUALLY HAD BASED ON THE
4 REPORT THAT WE HAVE IN EXHIBIT 20, I BELIEVE, AND TO MY
5 DECLARATION IN THE SENTENCING MEMORANDUM, WE LOOKED AT THE
6 ACTUAL BLOOD TEST SHE TOOK BECAUSE MR. LEACH SAID, WELL, WE
7 DON'T KNOW IF IT'S ACTUALLY FINGERSTICK, RIGHT?

8 SO WE LOOKED AT ALL OF THE TESTS THAT SHE HAD, AND WE
9 DETERMINED, AND THAT'S WHAT OUR HANDOUT SAYS, THAT EVERY SINGLE
10 ONE OF THOSE TESTS THAT HIS MOTHER HAD IN MARCH OF 2015 WERE
11 AVAILABLE AT THERANOS ON FINGERSTICK.

12 IN ADDITION, MR. BALWANI'S SISTER WHO SENT A LETTER TO THE
13 COURT, RUPA PAWANI, SAID SHE WAS THERE WHEN MR. BALWANI'S
14 MOTHER HAD FINGERSTICK.

15 AND THEN THE OTHER THING I'LL SAY ABOUT THAT, YOUR HONOR,
16 IS THAT OF COURSE THERE'S NO EVIDENCE HERE THAT -- WE KNOW HIS
17 MOTHER DID HAVE THE BLOOD TEST. THE REPORT IS IN THE RECORD.

18 THERE'S NO EVIDENCE HERE THAT MR. BALWANI SOMEHOW TOLD THE
19 LAB, OH, YOU KNOW, WHATEVER YOU DO, DON'T DO FINGERSTICK. HIS
20 MOTHER HAD A BLOOD TEST, A SERIES OF BLOOD TESTS. THOSE WERE
21 DUTIFULLY DONE BY THE LAB, AND THE RESULTS WERE REPORTED.

22 AND THAT FACT ALONE, I THINK, NEGATES ANY SUGGESTION THAT
23 MR. BALWANI IS PUTTING PATIENTS CONSCIOUSLY OR RECKLESSLY IN
24 DANGER AS THE GOVERNMENT ARGUES BECAUSE HE'S NOT GOING TO DO
25 THAT TO HIS OWN MOTHER AND OBVIOUSLY THAT POINT THE COURT

12:01PM 1 UNDERSTANDS.

12:01PM 2 SO IN ADDITION, THOUGH, THERE'S A LOT MORE, YOUR HONOR,
12:01PM 3 AND THAT IS WHAT ACTUALLY HAPPENED HERE. WHEN YOU LOOK AT THE
12:01PM 4 WHOLE HISTORY OF THE THERANOS LABORATORY THAT WAS IN OPERATION
12:01PM 5 BETWEEN 2013 TO 2015, IN HINDSIGHT YOU CAN LOOK AT THINGS LIKE
12:01PM 6 THE CMS REPORT AND, YOU KNOW, SOME OF THE THINGS THAT DR. DAS
12:01PM 7 SAID IN MS. HOLMES'S CASE AND SAY, WELL, MAYBE THEY SHOULD HAVE
12:01PM 8 DONE THINGS A LITTLE DIFFERENTLY. BUT IN REAL TIME, THOSE
12:01PM 9 AFTER-THE-FACT REPORTS DON'T BEAR ON WHAT MR. BALWANI WAS
12:01PM 10 TRYING TO DO OR NOT DO AS FAR AS PATIENT RISK AT THE TIME.

12:01PM 11 WHEN YOU LOOK AT IT IN REAL TIME, EVERY SINGLE TIME THAT
12:02PM 12 AN ISSUE WAS RAISED, MR. BALWANI DIDN'T SAY, WELL, SO WHAT, YOU
12:02PM 13 KNOW, WE DON'T CARE. IT WAS, LET'S GET TO THE BOTTOM OF THIS.

12:02PM 14 WHEN THERE WERE EMAILS AFTER EMAILS WHERE LET'S FIGURE
12:02PM 15 OUT WHAT IS GOING ON HERE, LET'S STOP TESTING UNTIL WE FIGURE
12:02PM 16 OUT WHAT THE PROBLEM IS, LET'S DO STUDIES.

12:02PM 17 AND THERE ARE SOME EXAMPLES THAT I THINK REALLY JUMP OUT,
12:02PM 18 AT LEAST FOR ME. FOR EXAMPLE, ON MAY 30TH, 2014, THE COURT
12:02PM 19 PROBABLY REMEMBERS THIS, DR. ROSENDORFF SENT AN EMAIL THAT SAID
12:02PM 20 STOP HCG TESTING ON THE THERANOS EDISON DEVICE, AND THAT'S THE
12:02PM 21 PREGNANCY RELATED TEST THAT YOU'VE HEARD ABOUT.

12:02PM 22 WELL, WHAT HAPPENED? THEY DID STOP. AND THEY STOPPED
12:02PM 23 UNTIL THE SCIENTIFIC TEAM AND THE LAB COULD LOOK AT WHAT WAS
12:02PM 24 GOING ON, AND WITHIN A FEW DAYS, THEY HAD DONE SOME STUDIES,
12:02PM 25 AND THE LABORATORY TEAM SENT EMAILS TO DR. ROSENDORFF, NOT

12:02PM 1 MR. BALWANI, AND SAID OKAY, WE'RE RELEASING THE RESULTS, WE
12:03PM 2 THINK WE'VE GOT THIS, AND DR. ROSENDORFF DIDN'T DO ANYTHING.
12:03PM 3 SO OKAY. RIGHT. SO THAT'S WHAT IS GOING ON HERE.

12:03PM 4 SO TO BLAME THIS ON MR. BALWANI WHERE HE'S CREATING A
12:03PM 5 CONSCIOUS RISK, THAT'S THE LAST THING THAT ANYONE WOULD WANT TO
12:03PM 6 DO RUNNING A COMPANY LIKE THIS. HE RELIED ON THE SCIENTIFIC
12:03PM 7 TEAM. DR. ROSENDORFF TESTIFIED THAT HE STOOD BY HIS VALIDATION
12:03PM 8 REPORTS. DR. ROSENDORFF SAID HE NEVER RELEASED, KNOWINGLY
12:03PM 9 RELEASED A RESULT THAT HE THOUGHT WAS INACCURATE.

12:03PM 10 MR. BALWANI HAD A LOT OF DATA THAT WAS PRESENTED TO HIM,
12:03PM 11 INCLUDING THE AAP REPORTS THAT YOU SAW AT TRIAL AND A LOT OF
12:03PM 12 OTHER MATERIALS THAT ASSURED HIM THAT THE LAB WAS NOT RELEASING
12:03PM 13 INACCURATE RESULTS TO PATIENTS.

12:03PM 14 AND THEN THE QC ISSUE WHICH THE GOVERNMENT MENTIONED IN
12:03PM 15 THEIR PAPERS, OF COURSE QC, QUALITY CONTROL, IS SOMETHING THAT
12:03PM 16 YOU DO. AND AS THE TESTIMONY AT TRIAL SHOWED, YOU DON'T
12:03PM 17 RELEASE THE RESULT UNTIL -- UNLESS THE QUALITY CONTROL PASSES.
12:04PM 18 SO THERE WAS NO EVIDENCE IN THIS CASE THAT MR. BALWANI DECIDED
12:04PM 19 LET'S RELEASE RESULTS ANYWAY EVEN IF THE QUALITY CONTROL FAILS.
12:04PM 20 THAT JUST NEVER HAPPENED.

12:04PM 21 SO I THINK FOR ALL OF THESE REASONS, INCLUDING THAT THERE
12:04PM 22 WERE MILLIONS OF TESTS HERE AND THE GOVERNMENT PRESENTED A
12:04PM 23 RELATIVELY SMALL HANDFUL, WE DON'T THINK THIS GUIDELINE
12:04PM 24 ADJUSTMENT SHOULD BE APPLIED TO MR. BALWANI ANY MORE THAN IT
12:04PM 25 COULD HAVE BEEN APPLIED TO MS. HOLMES, AND WE THINK THAT'S THE

12:04PM 1 RIGHT ACTION IN THIS CASE.

12:04PM 2 THE COURT: OKAY. ANYTHING FURTHER, MR. LEACH?

12:04PM 3 MR. LEACH: TWO BRIEF POINTS, YOUR HONOR.

12:04PM 4 THE FIRST IS AT LEAST IN THE CONTEXT OF SENTENCING FOR
12:04PM 5 THIS GUIDELINE, THE COURT DOES NOT NEED TO FIND A MILLION TESTS
12:04PM 6 WERE WRONG. THE COURT DOES NOT NEED A MILLION TESTS WERE
12:04PM 7 WRONG. THE COURT NEEDS TO FIND THAT WITH RESPECT TO A PATIENT.
12:04PM 8 WE HAVE MULTIPLE PATIENTS TESTIFY IN THE TRIAL.

12:04PM 9 BRITTANY GOULD, THE COURT MAY RECALL, TESTIFIED ABOUT HER FALSE
12:05PM 10 HCG TEST WHICH HAPPENED AFTER THE PROBLEMS WERE PURPORTEDLY
12:05PM 11 FIXED THAT MR. COOPERSMITH DESCRIBE. SO TO SAY THAT THERE
12:05PM 12 MIGHT HAVE BEEN SOME GOOD TESTS OUT THERE, DOES NOT RESPOND TO
12:05PM 13 WHETHER THE GUIDELINE APPLIES OR DOESN'T APPLY.

12:05PM 14 THE OTHER POINT I WOULD MAKE IS WE KNOW FROM THE CMS
12:05PM 15 REPORT AND FROM DR. DAS THAT THERANOS ITSELF CONCLUDED AT THE
12:05PM 16 END OF THE DAY THERE WAS A POSSIBLE PATIENT IMPACT FOR EVERY
12:05PM 17 ONE OF THE APPROXIMATELY 800,000 TESTS THAT WERE DONE ON THE
12:05PM 18 EDISON BETWEEN SEPTEMBER 2013 AND JUNE OF 2015. ALL OF THOSE
12:05PM 19 WERE VOIDED, AND THERANOS ITSELF SAID THERE'S A POSSIBLE
12:05PM 20 PATIENT IMPACT.

12:05PM 21 SO WE HAVE FALSE DOCUMENTS GOING TO THE PATIENTS, WE HAVE
12:05PM 22 A POSSIBLE PATIENT IMPACT ON ALL OF THEM, WE HAVE A DEFENDANT
12:05PM 23 WHO IS CONVICTED OF WILLFULLY JOINING THE CONSPIRACY AND ACTING
12:05PM 24 WITH AN INTENT TO DEFRAUD THOSE PATIENTS, AND EVERYTHING THAT
12:05PM 25 MR. COOPERSMITH SAID IS A DISAGREEMENT WITH THE JURY'S FINDING

12:05PM 1 THERE, AND I JUST DON'T SEE ANYTHING HE SAID THAT CAN
12:06PM 2 CONTRAVENE WHAT THE JURY HAS FOUND IN THIS CASE.

12:06PM 3 MR. COOPERSMITH: REALLY BRIEFLY, YOUR HONOR.
12:06PM 4 WE'RE NOT ARGUING THE JURY'S FINDING AT THIS MOMENT.
12:06PM 5 WHAT WE'RE SAYING IS THAT THE VERDICT DOESN'T GOVERN THIS
12:06PM 6 BECAUSE WE DON'T KNOW WHY THEY CONVICTED GIVEN THE GOVERNMENT'S
12:06PM 7 ARGUMENTS THAT THEY WERE TOLD THAT THERANOS WAS MORE ACCURATE.
12:06PM 8 AND IF IT WAS JUST AS ACCURATE AS EVERY OTHER LAB IN THE
12:06PM 9 COUNTRY, THAT WOULD NOT BE A REASON TO APPLY THIS FACTOR
12:06PM 10 OBVIOUSLY.

12:06PM 11 BUT JUST LET ME BRIEFLY MENTION BRITTANY GOULD SINCE
12:06PM 12 MR. LEACH MENTIONED IT, AND ALSO DR. DAS.

12:06PM 13 SO, FIRST OF ALL, ON BRITTANY GOULD, THE EMAILS THAT WERE
12:06PM 14 INTRODUCED AT TRIAL SHOWED THAT THE PROBLEMS WERE RAISED TO
12:06PM 15 MR. BALWANI'S LEVEL WHERE THERE WAS A PROBLEM WITH
12:06PM 16 BRITTANY GOULD'S TEST AND MR. BALWANI WAS TOLD THAT THERE WAS A
12:06PM 17 DECIMAL POINT ERROR IN THE RESULTS THAT WERE REPORTED TO HER
12:06PM 18 AND HER POSITION. SO THAT'S NOT A REASON WHY MR. BALWANI WAS
12:06PM 19 PUTTING SOMEONE AT RISK.

12:06PM 20 AND AS I SAID BEFORE, THAT WAS AN HCG TEST WHICH OCCURRED
12:07PM 21 SEVERAL MONTHS AFTER THAT INCIDENT THAT I JUST DESCRIBED WHERE
12:07PM 22 DR. ROSENDORFF STOPPED THE TESTING, THERE WAS A STUDY DONE, AND
12:07PM 23 THEN DR. ROSENDORFF ALLOWED IT TO GO BACK ON EDISON.

12:07PM 24 SO MONTHS -- A FEW MONTHS LATER, BRITTANY GOULD GOT THE
12:07PM 25 RESULT, THAT'S VERY UNFORTUNATE, BUT THAT'S NOT BECAUSE

1 MR. BALWANI WAS TRYING TO CREATE A RISK OR KNEW HE WAS CREATING
2 A RISK TO SOMEONE LIKE MS. GOULD OR SOMEONE SIMILARLY SITUATED.

3 ON THE ISSUE OF DR. DAS, DR. DAS DIDN'T TESTIFY IN
4 MR. BALWANI'S CASE OBVIOUSLY, BUT MR. BALWANI WAS INVOLVED IN
5 HIRING DR. DAS ALONG WITH MS. HOLMES. MR. BALWANI WAS STILL
6 THERE AT THE COMPANY IN THE LATTER PART OF 2015, AND THE FIRST
7 FEW MONTHS OF 2016 DR. DAS WAS HIRED. SO THIS WAS MR. BALWANI
8 WORKING WITH MS. HOLMES TO TRY TO UNDERSTAND THE ISSUES THAT
9 HAD BEEN RAISED BY CMS.

10 BUT IN ANY EVENT, THIS IS AFTER THE FACT, AND THAT DR. DAS
11 COMES ALONG AND HAS A CERTAIN VIEW OF THE WORLD, MR. BALWANI IS
12 WORKING WITH HIM, AND THAT DOESN'T SAY THAT BACK IN REAL TIME
13 IN 2013 AND '14 OR EARLIER IN '15 THAT MR. BALWANI KNEW THAT HE
14 WAS CREATING SOME KIND OF RISK TO PATIENTS.

15 IN FACT, WE SEE IN THE RECORD THAT DEVICES CAME OFFLINE.
16 THE GOVERNMENT ITSELF PRESENTED AN EXHIBIT WHERE EARLY IN 2015,
17 OR EVEN LATE IN '14, CERTAIN TESTS ON THE EDISON WAS STOPPED.

18 SO THIS WAS NOT A COMPANY THAT, AS MR. BALWANI WAS IN THE
19 MANAGEMENT TEAM OF, WAS TRYING TO PROVIDE INACCURATE RESULTS TO
20 PATIENTS. WE DON'T THINK THAT THE RECORD SUPPORTS THAT. THE
21 COURT'S COMMENT IN MS. HOLMES'S CASE IS THE EVIDENCE DOESN'T
22 SUPPORT THAT. WE THINK THAT'S A CORRECT OBSERVATION AND THIS
23 GUIDELINE ADJUSTMENT SHOULD NOT BE APPLIED.

24 THE COURT: ALL RIGHT. THANK YOU.

25 I THINK THE CONNECTION HERE IS A LITTLE BIT GREATER. THE

12:08PM 1 EVIDENCE HERE AS TO YOUR CLIENT, MR. BALWANI'S INTIMACY WITH
12:08PM 2 THE LAB IS SOMETHING THAT IT SEEMED TO ME THAT HE HAD PURVIEW
12:08PM 3 OVER THE LAB. YOU INDICATE THAT HE HIRED OR HAD PART OF HIRING
12:09PM 4 DR. DAS.

12:09PM 5 HE ALSO HIRED HIS DERMATOLOGIST AFTER DR. ROSENDORFF LEFT,
12:09PM 6 WHICH SUGGESTS THAT HE HAD MORE CONTROL. I THINK THAT WAS THE
12:09PM 7 GENERAL PRESENTATION AT THE TRIAL, AT THE TRIALS, THAT THE LAB
12:09PM 8 WAS KIND OF HIS BABY IF YOU WILL.

12:09PM 9 HE HIRED MS. SAWYER CONCURRENT OR SHORTLY AFTER HE HIRED
12:09PM 10 HIS DERMATOLOGIST TO BE THE LAB DIRECTORS IN THAT CASE. HE WAS
12:09PM 11 THE ONE WHO HAD GREATER RESPONSIBILITY IT SEEMED FOR THE LAB.
12:09PM 12 IF THERE WAS A DIVISION OF LABOR, THE LAB SEEMED TO BE HIS.
12:09PM 13 AND HE HAD -- THERE WERE EMAILS. THERE WAS MS. CHEUNG, WHEN
12:09PM 14 SHE HAD ISSUES WITH THE LAB, SHE WENT TO MR. BALWANI TO TALK TO
12:09PM 15 HIM ABOUT IT, AND WE KNOW ABOUT THAT CONVERSATION AND HIS
12:10PM 16 RESPONSE TO HER CONCERNS AND OTHERS.

12:10PM 17 SO I THINK THAT'S THE DISTINCTION THAT HIS INTIMACY IS A
12:10PM 18 LITTLE BIT CLOSER TO THE LAB THAN PERHAPS MS. HOLMES AND
12:10PM 19 PERHAPS THAT GIVES HIM A GREATER VISION OF RESPONSIBILITY FOR
12:10PM 20 THE OUTPUT FROM THAT LAB, AND I THINK THAT'S THE BASIS OF
12:10PM 21 WHAT -- ONE OF THE BASIS OF ARGUING WHY THIS SHOULD APPLY TO
12:10PM 22 MR. BALWANI.

12:10PM 23 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

12:10PM 24 I UNDERSTAND THE POINT. IT IS TRUE THAT MR. BALWANI HAD
12:10PM 25 MORE DIRECT PURVIEW OF THE LAB, BUT IT'S ALSO TRUE THAT EACH OF

12:10PM 1 THESE IMPORTANT ISSUES THAT THE GOVERNMENT SAID ARE PROBLEMS,
12:10PM 2 THAT MR. BALWANI SHOULD HAVE FIXED OR TAKEN INTO ACCOUNT TO
12:10PM 3 STOP TESTING, MS. HOLMES ALSO KNEW ABOUT.

12:10PM 4 AND I'LL JUST READ FROM THE GOVERNMENT'S SENTENCING MEMO
12:10PM 5 BRIEFLY. THEY SAY MS. HOLMES HAD ULTIMATE AUTHORITY OVER THE
12:10PM 6 LAB OPERATIONS JUST LIKE SHE DID EVERY OTHER ASPECT OF THE
12:10PM 7 COMPANY'S ACTIVITY. AN ORG CHART PRESENTED TO CMS BY THERANOS
12:11PM 8 DISPLAYED MS. HOLMES AT THE TOP OF THE CLIA OPERATION
12:11PM 9 OVERSEEING A GROUP COMPRISED OF MORE THAN 60 THERANOS EMPLOYEES
12:11PM 10 INCLUDING --

12:11PM 11 THE COURT: YOU'VE GOT TO SLOW DOWN.

12:11PM 12 MR. COOPERSMITH: YEAH. -- OVERSEEING A GROUP
12:11PM 13 COMPRISED OF MORE THAN 60 THERANOS EMPLOYEES, INCLUDING HER
12:11PM 14 COCONSPIRATOR, RAMESH BALWANI.

12:11PM 15 AND EVEN MORE IMPORTANTLY, YOUR HONOR, GOING TO THE ISSUE
12:11PM 16 OF HIRING DR. DHAWAN. SO HE WAS MR. BALWANI'S DERMATOLOGIST,
12:11PM 17 BUT I THINK THAT'S SELLING HIM A LITTLE SHORT. HE ALSO WAS THE
12:11PM 18 DIRECTOR OF THE CLINICAL LAB, AND HE WAS FULLY QUALIFIED. NO
12:11PM 19 ONE HAS EVER DISPUTED THAT.

12:11PM 20 THE COURT: HIS OWN LAB.

12:11PM 21 MR. COOPERSMITH: HE WAS. AND HE WAS ALSO LICENSED
12:11PM 22 AND HE SERVED AS THE LAB DIRECTOR.

12:11PM 23 BUT IN ADDITION -- AND WE PUT THESE DOCUMENTS INTO OUR
12:11PM 24 SENTENCING BRIEF. THE RECORD HERE SHOWS THAT MR. BALWANI,
12:11PM 25 RIGHT AFTER DR. ROSENDORFF LEFT IN NOVEMBER OF 2014, HE DIDN'T

1 JUST SAY, OH, LET'S GET MY DERMATOLOGIST IN HERE. HE WAS
2 INVOLVED IN AN ACTIVE SEARCH, A VERY ACTIVE SEARCH FOR A
3 FULL-TIME LAB DIRECTOR. HE PUT FORWARD DR. SAKSENA FOR THAT
4 PURPOSE. HE HAD MADE SURE THAT DR. SAKSENA HAD TIME TO STUDY
5 FOR THE TESTING HE HAD TO TAKE. THEY PUSHED THAT ISSUE WITH
6 THE REGULATORS, THE CALIFORNIA REGULATORS TO MAKE SURE HE WOULD
7 BE QUALIFIED. SO MR. BALWANI WAS NOT TRYING TO IGNORE THE
8 PROBLEM.

9 OF COURSE EVEN WHILE THEY WERE DOING THIS VERY ACTIVE LAB
10 DIRECTOR SEARCH AND DR. DHAWAN AND DR. SAWYER WERE FILLING IN
11 AS TEMPORARY LAB DIRECTORS, ALL OF THE SCIENTIFIC TEAM, PH.D.
12 LEVEL PEOPLE WERE STILL IN THE LAB. MR. BALWANI WAS NOT MAKING
13 DECISIONS, AND THERE'S NO EVIDENCE OF THIS OF WHICH PATIENT
14 RESULTS TO RELEASE AND WHICH PATIENT RESULTS NOT TO RELEASE.

15 SO WE THINK THAT IS A DISTINCTION THE COURT NOTED, BUT WE
16 DON'T THINK THAT MAKES A DIFFERENCE IN THIS CASE GIVEN THE SUM
17 TOTAL.

18 AGAIN, I WOULD JUST COME BACK TO WHAT I WOULD THINK WOULD
19 BE VERY UNFAIR TO APPLY THIS RESULT TO MR. BALWANI, THIS
20 ADJUSTMENT WHEN IT WASN'T APPLIED TO MS. HOLMES WHERE SHE HAD
21 THE SAME KNOWLEDGE AS THE COURT POINTED OUT IN DOCKET 1635.

22 AGAIN, THE JURY VERDICT DOESN'T CONTROL HERE. IT'S THE
23 PROVINCE OF THIS COURT TO MAKE THAT DECISION.

24 IF IT WAS SOMETHING IN THE VERDICT THAT WAS A SPECIAL
25 VERDICT, WE WOULD JUST BE IN A DIFFERENT POSITION, BUT WE JUST

12:13PM 1 DON'T HAVE THAT.

12:13PM 2 THE COURT: RIGHT. AND I THINK YOU WERE TALKING
12:13PM 3 ABOUT THE HISTORY OF WHEN PROBLEMS WOULD ARISE AND YOUR
12:13PM 4 CLIENT'S ATTENTION TO THEM, AND WE KNOW THAT AT THIS TIME THIS
12:13PM 5 WAS A CRITICAL STAGE, THERE WAS ROLLOUT HAPPENING. THIS WAS A
12:13PM 6 CRITICAL PART OF THE COMPANY'S EXISTENCE.

12:13PM 7 AND ANOTHER WAY OF LOOKING AT THE EVIDENCE, AND I DON'T
12:13PM 8 KNOW WHAT THE JURY THOUGHT ABOUT, BUT ONE WAY OF LOOKING AT IT
12:13PM 9 IS YOU LOSE YOUR LAB DIRECTOR, YOU'RE GOING TO LOSE CLIA, AND
12:13PM 10 EVERYTHING IS GOING TO COLLAPSE. THE COMPANY WOULD CEASE TO
12:13PM 11 EXIST.

12:13PM 12 SO, OF COURSE, THOSE RESPONSIBLE IN THE COMPANY, THE
12:13PM 13 LEADERSHIP WOULD DO WHATEVER THEY COULD TO KEEP, TO KEEP THE
12:13PM 14 COMPANY GOING. AND I THINK THIS IS WHAT YOUR POINT IS, HE
12:14PM 15 REACHED OUT TO A LAB DIRECTOR THAT HE KNEW THAT HE COULD HIRE
12:14PM 16 AS AN INTERIM PERHAPS TO KEEP THE COMPANY GOING.

12:14PM 17 AND WE ALL OBSERVED THE TESTIMONY OF THE DOCTOR AND WHEN
12:14PM 18 HE TESTIFIED ABOUT HIS WORK AND THE TIMES THAT HE SPENT ON SITE
12:14PM 19 AND THE NUMBER OF SIGNATURES THAT -- THE TRANCHES OF DOCUMENTS
12:14PM 20 THAT WERE PROVIDED TO HIM FOR HIS SIGNATURE AS LAB DIRECTOR
12:14PM 21 HAD TO SIGN OFF ON PROTOCOLS AND THINGS. HE TALKED ABOUT WHAT
12:14PM 22 HE DID, AND WE ALL RECALL THE DEMEANOR AND NATURE AND QUALITY
12:14PM 23 OF HIS TESTIMONY AS HE WAS EXAMINED ABOUT HIS WORK THERE. SO I
12:14PM 24 RECALL THAT.

12:14PM 25 I JUST SAY, THIS IS ANOTHER WAY OF LOOKING AT IT.

1 MR. LEACH MIGHT ARGUE THEY WERE DESPERATE AT THAT TIME TO
2 KEEP THE CONCERN GOING, AND THEY RECOGNIZED THAT PERHAPS THE
3 EFFECTS OR THE INABILITY OF THE MACHINES WERE ABOUT TO BE
4 REVEALED AND THEY WANTED TO KEEP THAT GOING. MAYBE THAT'S WHAT
5 THE GOVERNMENT'S POINT WAS. I DON'T KNOW. THEY DIDN'T ARGUE
6 THAT SPECIFICALLY.

7 BUT FOR PURPOSES OF THIS ALLOCATION OF THIS ENHANCEMENT, I
8 THINK I TAKE YOUR POINT, I UNDERSTAND -- I DON'T THINK YOU
9 WOULD QUARREL WITH THE FACT THAT THE DIVISION OF LABOR WAS SUCH
10 THAT YOUR CLIENT HAD GREATER CONTROL, INTIMACY OR PROVINCE OVER
11 THE LAB.

12 MR. COOPERSMITH: I DO QUARREL WITH THE TERM
13 "CONTROL," YOUR HONOR. AND JUST TO TAKE THE POINT THE COURT
14 JUST MADE --

15 THE COURT: WELL, HE HIRED HIS DERMATOLOGIST FOR THE
16 LAB DIRECTOR, MS. HOLMES DIDN'T.

17 MR. COOPERSMITH: WELL, MS. HOLMES WAS THE CEO OF
18 THE COMPANY. SHE KNEW FULL WELL WHO WAS BEING HIRED AS THE LAB
19 DIRECTOR.

20 THE COURT: HIS DERMATOLOGIST.

21 MR. COOPERSMITH: ABSOLUTELY. SHE KNOWS ALL OF
22 THESE THINGS. AGAIN, THE ADJUSTMENT WASN'T APPLIED TO HER.

23 THE COURT'S POINT THAT WE DON'T AGREE WITH THIS, BUT
24 JUST TO PLAY IT OUT, THAT, WELL, AT THIS TIME THEY NEEDED A LAB
25 DIRECTOR AND SO TO KEEP THE COMPANY GOING THEY HAD TO GET THE

12:16PM 1 LAB DIRECTOR IN PLACE AND KEEP THE CLINICAL LAB GOING. IF
12:16PM 2 THAT'S WHAT HAPPENED, THAT'S EQUALLY ON MS. HOLMES AS THE CEO.
12:16PM 3 SO I DON'T UNDERSTAND WHY THAT WOULD BE MEANINGFUL HERE.

12:16PM 4 THE COURT: NO.

12:16PM 5 MR. COOPERSMITH: AND THE OTHER THING I'LL SAY IS
12:16PM 6 THAT, OF COURSE, IN EARLY 2015 THE COMPANY OPENED AN ARIZONA
12:16PM 7 LAB WITH DANIEL YOUNG AS THE LAB DIRECTOR WHO WAS QUALIFIED
12:16PM 8 UNDER ARIZONA REQUIREMENTS, AND THAT LAB WAS DOING ALL FDA
12:16PM 9 APPROVED COMMERCIAL TESTING.

12:16PM 10 AND IN THAT TIMEFRAME EVEN WHILE, AS THE COURT POINTED
12:16PM 11 OUT, DR. DHAWAN AND DR. SAWYER WERE IN PLACE OF LAB DIRECTORS
12:16PM 12 UP IN NEWARK, MORE AND MORE TESTING WAS BEING SHIFTED TO THE
12:16PM 13 COMMERCIAL MACHINES.

12:16PM 14 AND I UNDERSTAND THE GOVERNMENT HAS OTHER ISSUES WITH THAT
12:16PM 15 ON THE INVESTMENT SIDE, BUT FOR THIS PURPOSE, THAT'S THE
12:16PM 16 OPPOSITE OF TRYING TO CREATE A RISK TO PATIENTS WHEN THEY'RE
12:16PM 17 ACTIVELY SPENDING MONEY AND TIME OPENING AN ARIZONA LAB AND IS
12:17PM 18 GOING TO TEST PATIENTS, AND THERE REALLY IS NO EVIDENCE IN THE
12:17PM 19 CASE OF COMMERCIAL TESTING IS SOMEHOW FLAWED AT LEAST AS FAR AS
12:17PM 20 HOW MR. BALWANI SAW IT.

12:17PM 21 THE COURT: HOW SHOULD I INTERPRET THE CONDUCT OR
12:17PM 22 THE ACTION THAT -- I THINK IT IS DR. DAS WHEN HE WAS ON BOARD
12:17PM 23 AND HE SAID, YOU KNOW, THE ONLY THING THAT WE CAN DO IS TO
12:17PM 24 INVALIDATE ALL OF THOSE TESTS? WHAT MR. LEACH SUGGESTS IS THAT
12:17PM 25 THAT IS PER SE EVIDENCE.

12:17PM 1 MR. COOPERSMITH: WELL, FIRST OF ALL, OF COURSE THE
12:17PM 2 ACTUAL LANGUAGE THAT DR. DAS USED WE POINT OUT AS AN ABUNDANCE
12:17PM 3 OF CAUTION.

12:17PM 4 BUT EVEN IF YOU TAKE THIS AS GOSPEL THAT DR. DAS REALLY
12:17PM 5 BELIEVED THAT THIS HAD TO BE DONE AND THAT'S HIS DECISION, IT'S
12:17PM 6 AFTER THE FACT, YOUR HONOR. AND SO MR. BALWANI, AS I SAID, IS
12:17PM 7 INVOLVED WITH MS. HOLMES TO HIRE DR. DAS, A LAB DIRECTOR FROM
12:17PM 8 UCLA, A HIGHLY QUALIFIED GUY, COMES IN AND HE LOOKS AT THE
12:17PM 9 WHOLE ISSUE, AND THEY ALLOW HIM TO DO THAT. NO ONE WAS TELLING
12:18PM 10 HIM DON'T LOOK AT THIS OR DON'T LOOK UNDER THIS ROCK.

12:18PM 11 HE LOOKS AT THE LAB AND THE DOCUMENTATION, AND HE COMES UP
12:18PM 12 WITH WHATEVER VIEW HE COMES UP WITH. BUT THE FACT THAT HE DID
12:18PM 13 THAT LATER WHEN THERE WAS NO MORE FINGERSTICK TESTING GOING ON.
12:18PM 14 AS OF SEPTEMBER 2015 WHEN CMS CAME IN, THE EDISON HAD BEEN
12:18PM 15 STOPPED FOR MONTHS AND EVEN THE MODIFIED PREDICATE MACHINES
12:18PM 16 WHICH ALSO DID FINGERSTICK WERE STOPPED AT THAT POINT.

12:18PM 17 SO BY THE TIME THAT DR. DAS CAME IN, IT WAS ALL NOT BEING
12:18PM 18 CONDUCTED ANYMORE. IT WAS ALL COMMERCIAL TESTING.

12:18PM 19 AND SO IT'S LIKE THE SAME AS IF YOU BRING IN AN EXPERT FOR
12:18PM 20 ANY BUSINESS OR LABORATORY AFTER THE FACT AND HE MAKES SOME
12:18PM 21 CONCLUSIONS ABOUT PROBLEMS, IT DOESN'T GO TO WHAT MR. BALWANI
12:18PM 22 KNEW AT THE TIME THAT THE LAB WAS OPERATING WITH FINGERSTICK,
12:18PM 23 AND IT JUST DOESN'T AFFECT THAT.

12:18PM 24 SO IT'S AFTER-THE-FACT INFORMATION.

12:18PM 25 WHAT WE HAVE TO DETERMINE FOR PURPOSES OF THIS GUIDELINE

12:19PM 1 ADJUSTMENT IS WHETHER AT THE TIME THESE RESULTS WERE GOING OUT
12:19PM 2 MR. BALWANI WAS CREATING CONSCIOUSLY OR RECKLESSLY A RISK OF
12:19PM 3 THIS PATIENT HARM, AND THE EVIDENCE HERE IS THAT HE WAS NOT
12:19PM 4 DOING THAT.

12:19PM 5 EVEN IF THE COURT THOUGHT, WELL, MAYBE IN SOME CASES
12:19PM 6 THAT'S WHAT HAPPENED, THAT WOULD NOT SHOW THAT MR. BALWANI WAS
12:19PM 7 DOING THAT CONSCIOUSLY OR RECKLESSLY. HE WAS TRYING TO DO WHAT
12:19PM 8 HE COULD, EVEN IF THE COURT THINKS IT'S INADEQUATE, DO WHAT HE
12:19PM 9 COULD TO FIX THE PROBLEMS AND MAKE SURE THAT THE SCIENTIFIC
12:19PM 10 TEAM WAS ON TOP OF THESE ISSUES SO THAT PATIENT RESULTS WERE AS
12:19PM 11 GOOD AS THEY COULD GET.

12:19PM 12 THE COURT: THAT'S YOUR INTERPRETATION?

12:19PM 13 MR. COOPERSMITH: YES, YOUR HONOR, I THINK THAT'S
12:19PM 14 FAIR FROM THE CASE IN THE CASE.

12:19PM 15 THE COURT: OKAY. THANK YOU.

12:19PM 16 LET'S TAKE ABOUT 20 MINUTES, AND THEN WE'LL COME BACK AND
12:19PM 17 WE WILL INCLUDE THE CALCULATIONS. THANK YOU.

12:19PM 18 MR. LEACH: THANK YOU, YOUR HONOR.

12:19PM 19 (RECESS FROM 12:19 P.M. UNTIL 12:50 P.M.)

12:50PM 20 THE COURT: WE'RE BACK ON THE RECORD IN THE BALWANI
12:50PM 21 MATTER. ALL PARTIES PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

12:50PM 22 I'D LIKE TO CONTINUE OUR CONVERSATION. WE MENTIONED THE
12:50PM 23 SUBMISSION BY THE DEFENSE YESTERDAY OF A DOCUMENT, AND I DON'T
12:50PM 24 THINK IT'S BEEN FORMALLY -- I THINK IT WAS SUBMITTED WITH YOUR
12:50PM 25 REQUEST, I THINK, TO BE --

12:50PM 1 MR. COOPERSMITH: IT WAS AN ADMINISTRATIVE MOTION
12:50PM 2 FOR LEAVE TO FILE IT.

12:50PM 3 THE COURT: THAT'S RIGHT. IT HASN'T BEEN ACTED ON.
12:50PM 4 I'VE TALKED ABOUT IT. IT'S DOCUMENT 1677.

12:50PM 5 THANK YOU, MS. ROBINSON.

12:50PM 6 I'LL ADMIT THAT NOW JUST FOR THE RECORD.

12:51PM 7 ALL RIGHT. THANK YOU.

12:51PM 8 ANY OTHER COMMENT FROM COUNSEL ABOUT ANY OF THE LOSS
12:51PM 9 CALCULATIONS THAT WE HAVE TALKED ABOUT BEFORE THE BREAK,
12:51PM 10 MR. LEACH?

12:51PM 11 MR. LEACH: NO, YOUR HONOR. THANK YOU.

12:51PM 12 MR. COOPERSMITH: NO, YOUR HONOR. THANK YOU.

12:51PM 13 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

12:51PM 14 ALL RIGHT. THANK YOU.

12:51PM 15 WHAT I WOULD LIKE TO DO IS TO GIVE YOU THE COURT'S
12:51PM 16 DECISIONS ON THESE MATTERS SUCH THAT WE CAN PROCEED WITH THE
12:51PM 17 GUIDELINE CALCULATIONS AND GOING FORWARD.

12:51PM 18 FIRST OF ALL, AS TO THE LOSS CALCULATION MATTER AND THE
12:52PM 19 FIRST ISSUE IS WHAT IS THE STANDARD THAT THE COURT SHOULD APPLY
12:52PM 20 THAT IS PREPONDERANCE OR CLEAR AND CONVINCING?

12:52PM 21 THE COURT IS GOING TO FIND THAT IN THIS MATTER THE
12:52PM 22 PREPONDERANCE OF THE EVIDENCE LEVEL IS APPROPRIATE IN THIS
12:52PM 23 CASE, AND THE COURT WILL APPLY THAT STANDARD CITING LAURIENTI,
12:52PM 24 611 FED. 3D, AND THE BERGER CASE AT 587 FED 3D.

12:52PM 25 I KNOW WE'VE TALKED ABOUT THE LONICH CASE. I DO THINK

12:52PM 1 LONICH IS DISTINGUISHABLE FROM OUR CASE HERE. OF COURSE,
12:52PM 2 LONICH INVOLVED -- AND I THINK, MS. WALSH, YOU'VE MENTIONED
12:52PM 3 THIS -- THERE'S AN ISSUE ABOUT THE TOTAL BANK FAILURE VIS-À-VIS
12:52PM 4 THE FRAUD ON THE INVESTORS AND THE STRUGGLE THAT THE COURT HAD
12:52PM 5 AND THE PARTIES HAD WITH TRYING TO MATCH THOSE TWO LOSSES.
12:52PM 6 THIS IS A VERY DIFFERENT FACT PATTERN, ALBEIT COMPLICATED
12:52PM 7 NONETHELESS, BUT IT'S DIFFERENT FROM LONICH. SO I DO FIND THAT
12:53PM 8 THE PREPONDERANCE OF THE EVIDENCE IS THE APPROPRIATE STANDARD
12:53PM 9 TO USE, AND THE COURT WILL USE THAT.

12:53PM 10 THERE WAS ANOTHER OBJECTION I WANTED TO MENTION THAT
12:53PM 11 MR. BALWANI SUGGESTED THAT -- REGARDING -- I THINK MS. WALSH
12:53PM 12 TALKED ABOUT INTERVENING CAUSES AND DISRUPTION OF A CAUSAL
12:53PM 13 CHAIN. I DO WANT TO INDICATE THAT THE COURT IS GOING TO -- ANY
12:53PM 14 ACTIONS THAT THERANOS TOOK AFTER MAY 2016 ARE NOT ATTRIBUTABLE,
12:53PM 15 AND THE COURT WON'T CONSIDER THOSE AS ATTRIBUTABLE AS TO
12:53PM 16 MR. BALWANI.

12:53PM 17 IN THE COURT'S LOSS CALCULATION, THE OFFSET OF TOTAL
12:54PM 18 INVESTOR LOSS AMOUNT IS THE VALUE OF THERANOS AT A POINT IN
12:54PM 19 TIME PRIOR TO THE DEFENDANT'S DEPARTURE. SO THAT SPECIFIC
12:54PM 20 OBJECTION IS REALLY NOT NECESSARY, AGAIN, UNDER FEDERAL RULE OF
12:54PM 21 CRIMINAL PROCEDURE 32(I)(3)(B) BECAUSE THE COURT IS NOT GOING
12:54PM 22 TO USE ANY POST 2016 CONDUCT AS ITS DETERMINATION OF THE
12:54PM 23 DEFENDANT'S SENTENCING.

12:54PM 24 TURNING TO THE SABA REPORT, AND I'LL JUST CALL IT THAT.
12:54PM 25 WE'VE HAD SOME ROBUST CONVERSATION ABOUT THAT.

1 WE KNOW, AS MR. LEACH POINTS OUT, AND I DON'T THINK THE
2 DEFENSE PARTS COMPANY WITH, THAT THE COURT'S OBLIGATION IN THE
3 LOSS CALCULATION IN THE SEARCH FOR A LOSS CALCULATION IS A
4 REASONABLE, REALISTIC, AND ECONOMIC PROJECTION OF LOSS BASED ON
5 THE EVIDENCE AND WEST COAST ALUMINUM TEACHES THAT AT
6 265 FED. 3D.

7 WE HAD SOME DISCUSSION ABOUT MR. SABA'S REPORT AND THE
8 ANALYSIS THAT HE TOOK. THE SABA REPORT'S ESTIMATION OF
9 VALUATION PROVIDES THREE DIFFERENT DATES REGARDING THE ANALYSIS
10 AND FOR THE PURPOSES OF ITS LOSS CALCULATION THE COURT SELECTS
11 THE DATE CLOSEST IN TIME AGAIN TO THE C INVESTMENTS, WHICH IS
12 DECEMBER 31, 2014.

13 LET ME INDICATE, AS I DID IN THE COMPANION CASE, I AM
14 GOING TO TELL YOU THE COURT'S DECISIONS NOW FOR PURPOSES OF
15 INFORMATION FOR TODAY'S SENTENCING. I WILL ISSUE SHORTLY A
16 FORMAL ORDER THAT MEMORIALIZES THE COURT'S FINDINGS AND THE
17 REASONS AND BASIS FOR IT FOR YOUR BENEFIT AND FOR THE RECORD.
18 SO YOU'LL HAVE A MORE FULSOME ORDER THAT CAPTURES THE COURT'S
19 DECISION HERE AFTER TODAY.

20 AND THE COURT WILL ALSO SELECT THE INCOME METHOD. IT
21 FINDS THAT IT IS THE MOST APPROPRIATE FOR ONGOING COMPANIES AND
22 IT DOES PROVIDE -- ACTUALLY IN THE COURT'S ANALYSIS HERE, IT
23 DOES PROVIDE A HIGHER COMPANY VALUATION AGAIN AND AGAIN, NOTING
24 THAT THAT IS ACTUALLY MORE FAVORABLE TO THE DEFENSE.

25 THERE WAS AN ARGUMENT ABOUT THE SABA REPORT'S LOSS RANGE

12:56PM 1 BEING TOO BROAD. I THINK MS. WALSH POINTS US TO THAT AND
12:56PM 2 SUGGESTS THAT THE LOSS CALCULATIONS WERE INCORRECT PROVIDING
12:56PM 3 INFORMATION FROM WEINGUST, DR. WEINGUST, MR. WEINGUST AND
12:56PM 4 OTHERS, MR. REIFF AS WELL.

12:56PM 5 AND I -- MR. SABA USED -- I THINK THE ALLEGATION WAS THAT
12:56PM 6 SABA'S 45 PERCENT RATE WAS EXCESSIVE AND SHOULD HAVE USED
12:57PM 7 PEPPERDINE STUDIES, AND I TALKED ABOUT WHAT THE COURT WAS DOING
12:57PM 8 YESTERDAY AFTERNOON AFTER IT RECEIVED THE FILING AND THE EXPERT
12:57PM 9 REPORTS AND THOSE THINGS.

12:57PM 10 AND WHILE I DON'T WANT TO SAY I'M TROUBLED BY THE BATTLE
12:57PM 11 OF QUANTUM EXPERTS, I APPRECIATE THAT THERE'S ROBUST ARGUMENT
12:57PM 12 FOR THIS. IT'S A VERY CRITICAL POINT FOR BOTH SIDES. I
12:57PM 13 APPRECIATE THAT, THAT ARGUMENT.

12:57PM 14 BUT AS I POINTED OUT, THE -- THIS IS A CRIMINAL CASE, NOT
12:57PM 15 A CIVIL CASE. MS. WALSH TELLS US THAT, TOO. IT HAS GREATER --
12:57PM 16 OBVIOUSLY THERE'S LIBERTY INTERESTS HERE THAT OUTWEIGH ANY
12:57PM 17 CIVIL INTEREST, BUT, AGAIN, THE COURT'S TASK HERE, AIDED BY
12:57PM 18 YOUR REPORTS, YOUR COMMENTS AND YOUR ASSISTANCE, IS TO FIND A
12:57PM 19 REASONABLE -- IS TO USE REASONABLENESS TO FIND A REASONABLE
12:58PM 20 AMOUNT HERE.

12:58PM 21 WE'RE NOT IN A BUSINESS CONTEXT, AS MANY OF YOU ARE
12:58PM 22 FAMILIAR WITH, OR AS I POINTED OUT, SOME OF THE EXPERT'S WORK
12:58PM 23 IN THE PAST HAS BEEN TO PROVIDE SOME EQUITY AND DIVISION OF
12:58PM 24 COMMUNITY PROPERTY IN A DISSOLUTION PROCEEDING. THAT'S NOT THE
12:58PM 25 FUNCTION HERE. THAT PRECISENESS, AND I THINK YOU BOTH

12:58PM 1 RECOGNIZE, BOTH SIDES RECOGNIZE, IT'S NOT ALWAYS ASCERTAINABLE,
12:58PM 2 AND THAT'S WHY THE CASES TELL US THAT THE SEARCH IS REALLY
12:58PM 3 BASED ON REASONABLENESS, RECOGNIZING THE COMPLEXITY OF THESE
12:58PM 4 CASES THAT COME BEFORE COURTS.

12:58PM 5 THE COURT DOES FIND THAT MR. SABA DID CONSIDER A BROADER
12:58PM 6 RANGE OF STUDIES AND DATA IN SELECTING THE 45 PERCENT NUMBER
12:58PM 7 THAT HE DID REACH. HE LOOKED AT THE DATA FROM THE PEPPERDINE
12:59PM 8 STUDIES, HE LOOKED AT ARANCA WITH ALL OF ITS CRITICISMS, HE
12:59PM 9 USED THE INFORMATION THAT WAS, AS I MENTIONED TO MS. WALSH, ON
12:59PM 10 THE TABLE, AND THE COURT FINDS THAT HIS REPORT, NOTWITHSTANDING
12:59PM 11 THE CRITICISM OF THE OTHER EXPERTS, THAT ARE HELPFUL IN
12:59PM 12 PROVIDING CONTEXT AND SUBJECTING THE SABA REPORT TO MORE
12:59PM 13 CRITICAL REVIEW, THOSE REPORTS AND THOSE CRITICISMS DID NOT
12:59PM 14 DISTURB THE COURT'S FINDING THAT THE SABA REPORT IS REASONABLE
12:59PM 15 AND FOUNDED ON RELIABLE DATA AND ANALYSIS.

12:59PM 16 THE COURT FINDS THAT, AGAIN, THAT THE SABA PROTOCOL IS
12:59PM 17 RELIABLE AND REASONABLY ESTIMATING THE RESULT FROM THIS FRAUD
12:59PM 18 CONSPIRACY.

12:59PM 19 THERE WAS ANOTHER OBJECTION BY -- AND THE COURT WILL
12:59PM 20 ACCEPT THE SABA REPORT AND USE THE SABA REPORT IN ITS ANALYSIS
01:00PM 21 FOR ITS FINDINGS.

01:00PM 22 THERE WAS ANOTHER OBJECTION BY THE DEFENDANT ABOUT LOSS
01:00PM 23 SUSTAINED BY PATIENT VICTIMS. LET ME INDICATE THAT THE COURT
01:00PM 24 IS GOING TO FIND AGAIN UNDER 32(I) (3) (B) THAT THIS IS
01:00PM 25 UNNECESSARY. THE COURT IS NOT GOING TO CONSIDER PATIENT LOSSES

01:00PM 1 IN REGARDS TO THE TOTAL LOSS AMOUNTS FOR 2B1.1(B) (1) .

01:00PM 2 MOVING TO THE VICTIM COUNT ENHANCEMENT. THIS IS
01:00PM 3 2B1.1(B) (2) (A) (I) . THIS IS THE 2 POINT ENHANCEMENT FOR 10 OR
01:00PM 4 MORE VICTIMS. THE COURT FINDS THAT, AGAIN, UNDER A
01:01PM 5 PREPONDERANCE OF EVIDENCE STANDARD THAT THE EVIDENCE DOES
01:01PM 6 SUPPORT A FINDING OF AT LEAST 12 VICTIMS, INVESTOR VICTIMS WHO
01:01PM 7 MEET THE DEFINITION OF VICTIMS AND UNDER THE GUIDELINES. AND
01:01PM 8 THE COURT WILL IDENTIFY THOSE 12:

01:01PM 9 THE FIRST ONE IS PFM;
01:01PM 10 TWO IS MOSLEY FAMILY HOLDINGS;
01:01PM 11 THREE IS RDV CORPORATION;
01:01PM 12 FOURTH IS KEITH RUPERT MURDOCH;
01:01PM 13 FIVE IS RICHARD KOVACEVICH;
01:01PM 14 SIX IS PEER VENTURE GROUP;
01:01PM 15 SEVEN IS LUCAS VENTURE GROUP;
01:01PM 16 EIGHT IS MENDENHALL;
01:01PM 17 NINE IS HALL BLACK DIAMOND;
01:02PM 18 TEN IS BLACK DIAMOND VENTURE;
01:02PM 19 ELEVEN IS ALAN EISENMAN; AND,
01:02PM 20 TWELVE IS SHERRIE EISENMAN.

01:02PM 21 INVESTMENTS MADE BY EACH OF THESE VICTIMS ARE INCLUDED IN
01:02PM 22 THE LOSS CALCULATION, AND ACCORDINGLY THE COURT FINDS THAT A 2
01:02PM 23 LEVEL ENHANCEMENT IS APPROPRIATE UNDER 2B1.1(B) (2) (A) (I) .

01:02PM 24 OBJECTION TWENTY-FOUR RELATES TO THE AGGRAVATING ROLE, AND
01:02PM 25 I'VE TALKED WITH COUNSEL ABOUT THIS. AND I THINK THE NINTH

01:02PM 1 CIRCUIT HOLDEN CASE, 908 FED. 3D CONTROLS HERE, AND THE COURT
01:02PM 2 RECOGNIZING THAT IN OUR DISCUSSION THIS MORNING ABOUT
01:02PM 3 CO-LEADERS AS A POSSIBILITY, THE COURT IS GOING TO NOT FIND
01:02PM 4 THAT THIS ENHANCEMENT SHOULD BE GIVEN. SO IF THAT MEANS THAT I
01:02PM 5 SUSTAIN THE DEFENSE OBJECTION, THAT'S WHAT I'VE DONE, AND I
01:03PM 6 WON'T FIND THAT ENHANCEMENT APPLIES HERE.

01:03PM 7 UNDER 2B1.1(B)(16)(A), THIS IS THE SERIOUS BODILY INJURY
01:03PM 8 ENHANCEMENT. WE HAD SOME ROBUST -- THIS IS VERY CLOSE, I
01:03PM 9 THINK, VERY CLOSE INDEED. WE HAD CONVERSATION ABOUT
01:03PM 10 MR. BALWANI'S WHAT I CALL INTIMACY WITH THE LAB, AND THE
01:03PM 11 EVIDENCE SHOWED TO THE COURT THAT HE HAD CONTROL AND
01:03PM 12 RESPONSIBILITY OVER THE LAB, AND THERE WERE ISSUES WITH THE
01:03PM 13 TESTING ACCURACY AND RELIABILITY OF THE PROPRIETARY DEVICE AND
01:03PM 14 THE TESTIMONY AT TRIAL SUGGESTED THAT. IT SUGGESTED THAT
01:03PM 15 MR. BALWANI WAS THE CONTACT PERSON.

01:03PM 16 IT APPEARED THAT HE WAS THE LEAD CONTACT PERSON, AT LEAST
01:03PM 17 IN THE ADMINISTRATIVE CHAIN OUTSIDE OF THE LABS AND LAB
01:03PM 18 DIRECTORS, AND HE HAD CONTROL OVER THAT. EMAILS WERE SENT TO
01:04PM 19 HIM REGARDING CONDUCT OF THE LAB, THE LAB'S ABILITY, THE
01:04PM 20 MACHINES, ISSUES WITH THE MACHINES. WE ALSO KNOW THE EVIDENCE
01:04PM 21 SHOWS THAT THERE WAS AT LEAST SOME INTEREST BY MR. BALWANI AND
01:04PM 22 PERHAPS HIS CODEFENDANT IN TRYING TO FIND OUT WHO WAS
01:04PM 23 RESPONSIBLE FOR LEAKING INFORMATION FROM THE LAB AND THAT ALSO
01:04PM 24 FELL UNDER HIS PURVIEW AND HE HAD GREAT CONCERNS ABOUT THAT,
01:04PM 25 WHICH DO SUGGEST THAT HE HAD GREATER OVERSIGHT AND CONTROL OVER

01:04PM 1 THE LAB SITUATION. AND MR. LEACH'S ARGUMENT SUGGESTS THAT THE
01:04PM 2 FACT THAT THERE WAS DR. DAS INVALIDATED AND CANCELLED ALL OF
01:04PM 3 THOSE TEST RESULTS IS PER SE EVIDENCE THAT THE COURT SHOULD USE
01:04PM 4 IN IMPOSING AND OTHERWISE ALLOWING THIS ENHANCEMENT AS AGAINST
01:05PM 5 MR. BALWANI.

01:05PM 6 AND, AGAIN, THIS IS A VERY CLOSE CALL. THE COURT HAS
01:05PM 7 CONSIDERED VERY CAREFULLY THOSE ARGUMENTS AS WELL AS ITS
01:05PM 8 OBSERVANCE OF THE EVIDENCE AT TRIAL, THE WAY THE EVIDENCE CAME
01:05PM 9 IN AT TRIAL, AND THE COURT IS, HOWEVER, NOT GOING TO IMPOSE
01:05PM 10 THIS. THE COURT IS GOING TO FIND THAT THERE'S INSUFFICIENT
01:05PM 11 EVIDENCE THAT REALLY DOES SHOW FACTUALLY THAT THERE WAS A
01:05PM 12 DISREGARDING OF THE RISK OR ACTUALLY A KNOWLEDGE OF THE RISK TO
01:05PM 13 PATIENTS OR AN ABILITY OR ACKNOWLEDGEMENT OF PROCEEDING WITH
01:05PM 14 THE TESTS NOTWITHSTANDING THAT.

01:05PM 15 IT'S VERY CLOSE, THOUGH, AND I THINK THE EVIDENCE COULD
01:05PM 16 VERY WELL -- AN ARGUMENT COULD BE MADE THAT MIGHT SUPPORT IT.
01:05PM 17 I'M NOT GOING TO FIND IT IN THIS CASE, AND I WILL DECLINE TO
01:05PM 18 APPLY THE 2 LEVEL ENHANCEMENT UNDER 2B1.1(B) (16) (A) .

01:06PM 19 LET ME GO THROUGH THEN THE GUIDELINE CALCULATIONS FOR
01:06PM 20 COUNSEL AND PROBATION. THESE ARE FOUND ON PAGE 22 OF
01:06PM 21 MS. GOLDSBERRY'S REPORT.

01:06PM 22 THERE'S A GROUPING OF THE COUNTS FROM ONE TO TWELVE, AND
01:06PM 23 PURSUANT TO 2B1.1(A) (1), AND THE COURT IS GOING TO FIND THAT
01:06PM 24 THE BASE OFFENSE LEVEL IS 7.

01:06PM 25 THE COURT IS GOING TO FIND THAT AFTER LOOKING AT THE SABA

01:07PM 1 REPORT AND THAT ANALYSIS, THE COURT IS GOING TO FIND THE TOTAL
01:07PM 2 LOSS TO INVESTOR VICTIMS IS \$120 MILLION AND UNDER 2B1.1(M) ,
01:07PM 3 THIS IS A 24 LEVEL INCREASE.

01:07PM 4 THE COURT WILL FIND UNDER 2B1.(B) (2) (A) (I) THE NUMBER OF
01:07PM 5 VICTIMS IS A 2 LEVEL INCREASE.

01:07PM 6 AS I'VE SAID, THE COURT IS NOT GOING TO FIND IN
01:07PM 7 PARAGRAPH 76 THE ROLE ADJUSTMENT FOR LEADERSHIP. THE ADJUSTED
01:07PM 8 OFFENSE LEVEL THEREFORE IS 33.

01:08PM 9 THE CRIMINAL HISTORY CATEGORY IS I.

01:08PM 10 AND THAT THEN YIELDS A GUIDELINE RANGE OF 135 TO
01:08PM 11 168 MONTHS.

01:08PM 12 MS. GOLDSBERRY?

01:08PM 13 PROBATION OFFICER: YES, YOUR HONOR.

01:08PM 14 THE COURT: AND THAT'S THE COURTS'S FINDING FOR
01:08PM 15 GUIDELINE CALCULATION.

01:08PM 16 AGAIN, THE COURT IS GOING TO PROVIDE COUNSEL WITH AN ORDER
01:08PM 17 THAT PROVIDES THE COURT'S MORE FULSOME DETAILS OF THE COURT'S
01:08PM 18 FINDINGS FOR THE RECORD, BUT I WANTED TO STATE AN OVERVIEW THE
01:08PM 19 REASON FOR THE COURT'S GUIDELINE CALCULATIONS.

01:08PM 20 ANY QUESTIONS? MR. LEACH?

01:08PM 21 MR. LEACH: NO, YOUR HONOR.

01:08PM 22 MR. COOPERSMITH: WE UNDERSTAND THE COURT'S RULING.

01:08PM 23 THE COURT: ALL RIGHT. THANK YOU.

01:08PM 24 ANYTHING FURTHER BEFORE I ASK IF THE PARTIES WISH TO BE
01:08PM 25 HEARD AS TO SENTENCING?

01:08PM 1 MR. LEACH: NO, YOUR HONOR.

01:08PM 2 THE COURT: ALL RIGHT.

01:08PM 3 MR. COOPERSMITH: NO, YOUR HONOR.

01:08PM 4 THE COURT: ALL RIGHT. THANK YOU.

01:09PM 5 DOES THE GOVERNMENT WISH TO BE HEARD?

01:09PM 6 MR. SCHENK: GOOD MORNING, YES. THANK YOU,
01:09PM 7 YOUR HONOR.

01:09PM 8 IF I COULD START WITH WHAT THE COURT HAD CALLED
01:09PM 9 SUBSTANTIVE PSR OBJECTIONS, AND I JUST WANTED TO FOR THE RECORD
01:09PM 10 CONFIRM THAT I THINK THERE WERE TWO THAT I THINK THE COURT HAS
01:09PM 11 NOT RULED ON YET, TWENTY-TWO AND TWENTY-THREE.

01:09PM 12 BASED ON WHAT THE COURT JUST SAID, THOUGH, IT SOUNDS LIKE
01:09PM 13 IT IS DENYING THE OBJECTIONS OR OVERRULING THE OBJECTIONS.
01:09PM 14 THEY BOTH HAD SOMETHING TO DO WITH THE ENHANCEMENTS FOR THE
01:09PM 15 NUMBER OF VICTIMS OR LOSS RELATED TO VICTIMS.

01:09PM 16 THE COURT: THAT'S RIGHT. I HOPE I MADE THAT CLEAR
01:09PM 17 WHEN I SAID I WOULD GET TO THOSE EARLIER IN OUR GUIDELINE
01:09PM 18 CALCULATIONS, BUT THAT'S THE SPIRIT OF THE COURT'S FINDINGS,
01:09PM 19 YES. THANK YOU.

01:09PM 20 MR. SCHENK: THANK YOU.

01:09PM 21 YOUR HONOR, I INTEND TO ADDRESS THE 3553(A) FACTORS AND
01:09PM 22 WHY THE COURT SHOULD IMPOSE A SENTENCE OF 180 MONTHS IN CUSTODY
01:10PM 23 IN THIS CASE. THE COURT JUST NOTED ITS GUIDELINE RANGE AND THE
01:10PM 24 RANGE HERE AS THE COURT STATED IS 135 TO 168.

01:10PM 25 THE GOVERNMENT'S RECOMMENDATION IS ABOVE THE GUIDELINES

01:10PM 1 THAT THE COURT JUST DETERMINED, AND WE STAND BY THAT
01:10PM 2 RECOMMENDATION AND BELIEVE THAT AN APPROPRIATE SENTENCE IN THIS
01:10PM 3 CASE COMES FROM THE STATUTE, COMES FROM 3553(A), AND WHEN WE
01:10PM 4 ANALYZE THE FACTORS, WE SEE THAT A SENTENCE OF 15 YEARS IS
01:10PM 5 APPROPRIATE.

01:10PM 6 THE COURT SHOULD KEEP IN MIND TWO SORT OF OVERARCHING
01:10PM 7 THEMES THAT ARE RELEVANT WHEN SENTENCING MR. BALWANI. THE
01:10PM 8 FIRST IS THE SIGNIFICANT ROLE HE PLAYED IN DEFRAUDING
01:10PM 9 INVESTORS, AND I'LL GO THROUGH THAT A LITTLE BIT MORE, BUT IT
01:10PM 10 IS NOT ACCURATE TO SAY THAT MS. HOLMES DEFRAUDED INVESTORS AND
01:10PM 11 SUNNY BALWANI RAN THE LAB. THAT IS AN OVERSIMPLIFICATION AND
01:10PM 12 MORE SO JUST ISN'T TRUE.

01:11PM 13 MR. BALWANI PLAYED A SIGNIFICANT ROLE IN THE INVESTOR
01:11PM 14 FRAUD. MR. BALWANI CREATED THE FINANCIAL STATEMENTS THAT THE
01:11PM 15 COURT WILL RECALL WERE OFF BY ONE BILLION DOLLARS. THOSE
01:11PM 16 FINANCIAL STATEMENTS WERE PROVIDED TO INVESTORS, AND
01:11PM 17 MR. BALWANI KNEW THAT THOSE FINANCIAL STATEMENTS WERE PROVIDED
01:11PM 18 TO INVESTORS.

01:11PM 19 SO NOT ONLY DID HE DO WORK ON THE FINANCIAL SIDE, HE ALSO
01:11PM 20 PLAYED A ROLE IN THE WALGREENS ROLLOUT. THE RELATIONSHIP WITH
01:11PM 21 WALGREENS WAS RELEVANT TO THE PATIENT FRAUD BECAUSE THAT WAS
01:11PM 22 THE LOCATION THAT THE PATIENTS WENT TO, TO RECEIVE THE BLOOD
01:11PM 23 TESTS, BUT IT ALSO WAS RELEVANT ON THE INVESTOR SIDE.

01:11PM 24 INVESTORS WERE TOLD THAT THERANOS HAD THIS HEALTHY AND
01:11PM 25 EXPANDING RELATIONSHIP WITH WALGREENS AND BECAUSE OF THAT HAD

01:11PM 1 MORE CONFIDENCE IN THE TECHNOLOGY, IN THE STABILITY OF THE
01:11PM 2 COMPANY, AND THOSE FACTS WERE COMMUNICATED TO INVESTORS.

01:11PM 3 MR. BALWANI PLAYED A ROLE IN THAT AND IN THE WALGREENS
01:12PM 4 RELATIONSHIP AND IN THE COMMUNICATION OF WALGREENS INFORMATION
01:12PM 5 TO INVESTORS.

01:12PM 6 FINALLY, THERE ARE CERTAIN INVESTORS THAT MR. BALWANI
01:12PM 7 PLAYED A SIGNIFICANT ROLE IN COMMUNICATING DIRECTLY WITH,
01:12PM 8 INDIVIDUALS LIKE BRIAN GROSSMAN AT PFM; INDIVIDUALS LIKE
01:12PM 9 ALAN EISENMAN WE'LL GET TO A LITTLE BIT LATER. MR. BALWANI
01:12PM 10 ALSO COMMUNICATED DIRECTLY WITH INVESTORS. SO HE PLAYED A
01:12PM 11 SIGNIFICANT ROLE IN THE INVESTOR SIDE.

01:12PM 12 ON THE PATIENT SIDE, AS THE COURT NOTED EARLIER THIS
01:12PM 13 MORNING, MR. BALWANI WAS INTIMATELY FAMILIAR WITH THE EVENTS IN
01:12PM 14 THE LAB. MR. BALWANI HIRED AND FIRED INDIVIDUALS IN THE LAB.
01:12PM 15 AND WHILE HE HAS ARGUED TO THE COURT THAT HE WAS UNDER
01:12PM 16 MS. HOLMES, MR. BALWANI HAD SIGNIFICANT AUTONOMY IN RUNNING THE
01:12PM 17 LAB. HE MADE DECISIONS THAT DIRECTLY IMPACTED THE INFORMATION
01:12PM 18 THAT WAS COMMUNICATED TO PATIENTS, AND IT IS IN THE LAB THAT
01:12PM 19 SOME OF THE GREATEST HARM OCCURRED, AND MR. BALWANI PLAYED A
01:13PM 20 SIGNIFICANT ROLE IN OVERSEEING THE CLINICAL LAB.

01:13PM 21 SO IT IS BOTH HIS ROLE IN THE PATIENT FRAUD AND HIS ROLE
01:13PM 22 IN THE INVESTOR FRAUD THAT SHOULD LEAVE THIS COURT TO DECIDE A
01:13PM 23 SIGNIFICANT CUSTODIAL SENTENCE SHOULD BE IMPOSED, AND THE
01:13PM 24 GOVERNMENT BELIEVES THAT THAT SENTENCE SHOULD BE 15 YEARS.

01:13PM 25 IN ORDER TO IMPOSE THAT SIGNIFICANT SENTENCE, THIS COURT

DOES NOT HAVE TO FIND THAT MR. BALWANI FOUNDED THERANOS. THE DEFENSE ARGUES THAT HE DID NOT PLAY THAT ROLE, AND, THEREFORE, HE SHOULD RECEIVE A SIGNIFICANT VARIANCE OR A PROBATIONARY SENTENCE.

IN ORDER TO SENTENCE MR. BALWANI TO A SIGNIFICANT CUSTODIAL SENTENCE, THE COURT NEED NOT CONCLUDE THAT THAT IS RESERVED FOR FACTORS. MR. BALWANI PLAYED A SIGNIFICANT ROLE IN THE TWO FRAUDS ONCE HE ARRIVED AT THERANOS.

THE COURT ALSO, IN ORDER TO IMPOSE A SIGNIFICANT SENTENCE, DOES NOT NEED TO CONCLUDE THAT MR. BALWANI INTENDED TO DEFRAUD EITHER INVESTORS OR PATIENTS WHEN HE ARRIVED AT THERANOS AROUND THE 2009 TIMEFRAME, JUST LIKE THE EVIDENCE AT TRIAL DID NOT PROVE THAT ELIZABETH HOLMES STARTED THERANOS WITH THE INTENT TO DEFRAUD, THE GOVERNMENT DID NOT PRESENT EVIDENCE AND IS NOT ARGUING TO THE COURT THAT IT MUST CONCLUDE THAT HIS INITIAL INTENT IN JOINING THERANOS WAS TO DEFRAUD.

INSTEAD WHAT HAPPENED HERE WAS BOTH HOLMES AND BALWANI MADE A CHOICE TO DEFRAUD INVESTORS AND PATIENTS WHEN THEY SAW THE RUNWAY, THE AMOUNT OF TIME THAT THERANOS HAD LEFT DWINDLING. THEY COULD HAVE ALLOWED THERANOS TO FAIL. INSTEAD THEY CHOSE TO COMMIT FRAUD BOTH TO INVESTORS AND PATIENTS, AND THAT CHOICE WASN'T MADE WHEN MR. BALWANI JOINED THERANOS OR WHEN MS. HOLMES FOUNDED THERANOS.

SO MY POINT HERE IS THERE ARE ARGUMENTS THAT THE DEFENSE IS MAKING TO THE COURT IN ADVANCING THEIR SENTENCING

RECOMMENDATION, AND THEY ARE RED HERRINGS. THE COURT NEED NOT REACH THESE CONCLUSIONS, THAT HE FOUNDED THERANOS OR THAT HE INITIALLY INTENDED TO DEFRAUD IN ORDER TO SENTENCE HIM TO A SIGNIFICANT CUSTODIAL TIME.

HIS ACTIONS DURING THE CONSPIRACY PERIODS, 2010 OR SO, WERE SUFFICIENTLY BAD TO JUSTIFY THIS SIGNIFICANT CUSTODIAL SENTENCE. WE NEED NOT LOOK FURTHER OR EARLIER IN TIME TO FIND ADDITIONAL HARM IN ORDER TO JUSTIFY A SIGNIFICANT CUSTODIAL SENTENCE.

THE 3553(A) FACTOR THAT THE COURT IS SUPPOSED TO CONSIDER ARE THE NATURE AND CIRCUMSTANCES OF THE OFFENSE. THIS IS A VERY AGGRAVATING FACTOR HERE FOR THE COURT TO CONSIDER AND WEIGH.

WHAT HAPPENED HERE IS NOT A DISCRETE BAD DECISION ON AN INDIVIDUAL DAY. INSTEAD, MR. BALWANI CAME TO WORK DAY AFTER DAY AND MADE MISREPRESENTATIONS TO INVESTORS. HE CREATED DOCUMENTS LIKE THE FINANCIAL STATEMENTS, AND HE ENGAGED WITH WALGREENS, AND BOTH WERE DONE DECEPTIVELY.

BUT THE DECEPTION DIDN'T END THERE. BOTH WERE THEN, THE FINANCIAL STATEMENTS AND THE HEALTH OF THE WALGREENS RELATIONSHIP, WERE USED AS TOOLS TO DEFRAUD INVESTORS. THEY WERE BOTH COMMUNICATED TO INVESTORS SO THAT INVESTORS BELIEVED THAT THEY WERE INVESTING IN A DIFFERENT COMPANY BASED ON REPRESENTATIONS THAT INVESTORS RECEIVED FROM MR. BALWANI. INVESTORS BELIEVED THAT THEY WERE INVESTING IN A COMPANY THAT

01:16PM 1 WAS GOING TO ACHIEVE SIGNIFICANT REVENUE, SIGNIFICANT INCOME IN
01:16PM 2 THE VERY NEAR TERM, A BILLION DOLLARS IN 2015 IS WHAT INVESTORS
01:16PM 3 WERE TOLD SHORTLY BEFORE 2015.

01:16PM 4 INVESTORS WERE TOLD BASED ON REPRESENTATIONS DIRECTLY FROM
01:16PM 5 MR. BALWANI THAT THEY WERE INVESTING IN A COMPANY THAT HAD A
01:16PM 6 HEALTHY AND EXPANDING RELATIONSHIP WITH WALGREENS. THAT'S NOT
01:16PM 7 WHAT MR. BALWANI WAS TOLD.

01:16PM 8 MR. BALWANI WAS TOLD BY MR. JHAVERI, WHO THE COURT HEARD
01:17PM 9 FROM DURING TRIAL, THAT WALGREENS WAS CONCERNED ABOUT THE
01:17PM 10 FINGERSTICK DRAW PERCENTAGE AND WOULD NOT EXPAND BEYOND ARIZONA
01:17PM 11 UNTIL THAT NUMBER CAME -- INCREASED, THE NUMBER OF FINGERSTICK
01:17PM 12 DRAWS INCREASED.

01:17PM 13 THAT'S WHAT MR. BALWANI HEARD FROM WALGREENS. THAT IS NOT
01:17PM 14 WHAT INVESTORS HEARD FROM MR. BALWANI.

01:17PM 15 WHAT INVESTORS HEARD WAS THAT THERANOS WAS IN A HEALTHY
01:17PM 16 AND EXPANDING RELATIONSHIP WITH WALGREENS AND IT IS SO HEALTHY,
01:17PM 17 LOOK AT OUR FINANCIAL PROJECTIONS IN THE VERY NEAR TERM, 2014
01:17PM 18 AND 2015, THAT ARE BASED ON A GREATLY INCREASED NUMBER OF
01:17PM 19 STORES THAT THERANOS CLAIMS THAT IT WOULD BE PRESENT WITHIN
01:17PM 20 WALGREENS STORES GOING NATIONWIDE IN A VERY SHORT PERIOD OF
01:17PM 21 TIME.

01:17PM 22 AGAIN, THAT'S NOT WHAT MR. BALWANI KNEW FROM WALGREENS,
01:17PM 23 BUT INSTEAD THAT'S WHAT MR. BALWANI KNEW THAT HE HAD TO
01:17PM 24 COMMUNICATE TO INVESTORS IN ORDER TO ENCOURAGE THEM TO INVEST.

01:17PM 25 MR. BALWANI DIDN'T ONLY MISLEAD THE INVESTORS BEFORE THEY

01:18PM 1 INVESTED, BUT THERE'S A GOOD EXAMPLE. THE COURT WILL REMEMBER
01:18PM 2 TRIAL EXHIBIT 2057 IN THE BALWANI TRIAL IN -- AT THAT TIME
01:18PM 3 ALAN EISENMAN FOUND A REPORT BY A CONSULTANT AT UBS. AND IN
01:18PM 4 THAT REPORT THE CONSULTANT REACHES SOME CONCLUSIONS ABOUT
01:18PM 5 THERANOS, AND ALAN EISENMAN FOUND THOSE CONCLUSIONS
01:18PM 6 INTERESTING. I'LL COME BACK TO THIS IN A MOMENT AND IDENTIFY
01:18PM 7 FOR THE COURT PRECISELY THESE CONCLUSIONS.

01:18PM 8 BUT THESE CONCLUSIONS IN A PUBLICALLY AVAILABLE SOURCE
01:18PM 9 DOCUMENT WERE COMMUNICATED TO MR. BALWANI, THEY WERE SURPRISING
01:18PM 10 TO ALAN EISENMAN, AND WHEN CONFRONTED WITH THESE FACTS,
01:18PM 11 MR. BALWANI TOLD ALAN EISENMAN THAT IT SOUNDS LIKE THIS IS FROM
01:18PM 12 AN UNINFORMED CONSULTANT.

01:18PM 13 MR. BALWANI KNEW AND NOT ONLY THAT INVESTORS NEEDED TO BE
01:18PM 14 DECEIVED ON THE FRONT IN ORDER FOR THEM TO INVEST, BUT ALSO THE
01:19PM 15 DECEPTION MUST CONTINUE. THE TRUTH OF WHAT WAS HAPPENING AT
01:19PM 16 THERANOS COULD NOT GET OUT, OTHERWISE THE HOUSE OF CARDS WOULD
01:19PM 17 COLLAPSE.

01:19PM 18 SO THERE'S INSTANCES BOTH OF MR. BALWANI MISLEADING
01:19PM 19 INVESTORS BEFORE THEY INVEST, BUT ALSO PERPETUATING THE FRAUD
01:19PM 20 EVEN POST INVESTMENT LIKE THIS EXAMPLE. MR. BALWANI ALSO, TO
01:19PM 21 CONTINUE THIS NATURE AND CIRCUMSTANCES OF THE OFFENSE ARGUMENT,
01:19PM 22 PLAYED A SIGNIFICANT ROLE IN THE CLINICAL LAB BY REMOVING
01:19PM 23 DISSENT.

01:19PM 24 WHEN ERIKA CHEUNG GOES TO MR. BALWANI AND SAID THAT SHE
01:19PM 25 WAS CONCERNED ABOUT THE TEST RESULTS, SOME OF THE QC DATA, WHAT

01:19PM 1 ERIKA CHEUNG TOLD THIS JURY WAS THAT MR. BALWANI TOLD HER THAT
01:19PM 2 WASN'T HER JOB. HER JOB WAS TO PROCESS PATIENT SAMPLES AND NOT
01:19PM 3 ASK QUESTIONS.

01:19PM 4 AND WHEN INDIVIDUALS LIKE ERIKA CHEUNG OR TYLER SHULTZ OR
01:20PM 5 DR. ROSENDORFF RAISED CONCERNS, WHEN THEY WERE UNCOMFORTABLE
01:20PM 6 WITH WHAT THEY WERE BEING ASKED TO DO AT THERANOS, THERE WAS
01:20PM 7 ONLY ONE PLACE FOR THEM, AND THAT WAS THE EXIT. THEY, BECAUSE
01:20PM 8 THEY WORKED UNDER SUNNY BALWANI, KNEW THEY COULDN'T STAY AT
01:20PM 9 THERANOS, AND THEY WERE ALL GIVEN THE OPTION: PROCESS PATIENT
01:20PM 10 SAMPLES OR LEAVE.

01:20PM 11 AND WHEN SOMEONE LIKE DR. ROSENDORFF LEFT, YOU CAN SEE
01:20PM 12 WHAT MR. BALWANI DESIRED THROUGH WHO HE HIRES TO REPLACE HIM.
01:20PM 13 WE HAD A DISCUSSION ABOUT THIS EARLIER THIS MORNING.

01:20PM 14 MR. BALWANI HIRES DHAWAN AND SAWYER, TWO LARGELY ABSENTEE
01:20PM 15 LAB DIRECTORS, BECAUSE SOMEONE WHO WAS PRESENT WOULD HAVE ASKED
01:20PM 16 TOO MANY QUESTIONS AT THAT POINT. THERE WASN'T A WAY TO KEEP
01:20PM 17 THERANOS GOING AND HAVE AN ENGAGED ADAM ROSENDORFF-LIKE LAB
01:20PM 18 DIRECTOR. SO INSTEAD HE TURNED TO INDIVIDUALS THAT HE KNEW HE
01:20PM 19 COULD KEEP IN THE DARK, AND MR. BALWANI WOULD ACT AS THE
01:20PM 20 DE FACTO LAB DIRECTOR.

01:20PM 21 YOU HEARD TESTIMONY IN TRIAL FROM SAWYER AND DHAWAN ABOUT
01:21PM 22 NOT JUST THE NUMBER OF HOURS OR THE LACK OF HOURS THAT THEY
01:21PM 23 SPENT AT THE LAB, BUT THEIR LACK OF KNOWLEDGE REGARDING EVEN
01:21PM 24 THE TESTING PLATFORMS AT THERANOS. THEY DIDN'T KNOW THAT
01:21PM 25 THERANOS WAS USING THERANOS DEVICES TO RUN TESTS.

MR. BALWANI WOULD HAVE YOU BELIEVE THAT THAT WAS A TEMPORARY FIX, THAT HIS HOPE WAS THAT AN EMPLOYEE AT THERANOS WOULD EVENTUALLY BECOME QUALIFIED TO BECOME THE LAB DIRECTOR, THAT SHOULD GIVE THIS COURT NO COMFORT.

DURING THAT PERIOD OF TIME, THEY WERE TESTING PATIENT'S BLOOD JUST LIKE THEY WERE WHEN ADAM ROSENDORFF WAS THERE, JUST LIKE THEY WERE AFTER DHAWAN AND SAWYER LEFT.

TO SAY THIS WAS A TEMPORARY FIX ONLY MATTERS IF THEY STOPPED TESTING DURING THAT PERIOD OF TIME. BUT THERE WAS NO ADJUSTMENT TO THE WAY THEY TREATED INDIVIDUAL PATIENTS WHO TRUSTED THERANOS TO ASSIST THEM IN MAKING MEDICAL DECISIONS.

MR. BALWANI HAD A CHOICE IN THAT MOMENT, TO CONTINUE TO HAVE ENGAGED LAB DIRECTORS LIKE DR. ROSENDORFF, OR NOT. AND HE KNEW WHAT WOULD HAPPEN IF HE CONTINUED TO HAVE ENGAGED LAB DIRECTORS, AND HE MADE A DIFFERENT CHOICE. AND IT IS THAT CHOICE AND HIS MANY OTHER CHOICES THAT SHOULD LEAD THIS COURT TO CONCLUDE THAT THE NATURE AND CIRCUMSTANCES OF THE OFFENSE ARE A SIGNIFICANTLY AGGRAVATING FACTOR AND SHOULD LEAD THE COURT TO IMPOSE A SIGNIFICANT CUSTODIAL SENTENCE.

ON THE SAME POINT, THE DEFENSE HAS ARGUED TO THE COURT THAT MR. BALWANI RECEIVED NO FINANCIAL BENEFIT FROM THE FRAUD AND FOR THAT REASON THIS SHOULD BE A MITIGATING FACTOR. I WANT TO BE CLEAR ABOUT THIS. IF THE COURT CONCLUDED THE WAY THAT THE GOVERNMENT ADVOCATED THE GUIDELINES, THAT IS, THE GOVERNMENT'S VIEW OF THE GUIDELINES ARE MR. BALWANI UNDER THE

01:22PM 1 GUIDELINES SHOULD GET A LIFE SENTENCE, THAT HE'S AN ADJUSTED
01:22PM 2 OFFENSE LEVEL 43, CRIMINAL HISTORY CATEGORY I, THEREFORE, THE
01:22PM 3 COURT SHOULD IMPOSE LIFE ACCORDING TO THE GUIDELINES. THE
01:22PM 4 GOVERNMENT BELIEVES THAT THE LACK OF A FINANCIAL MOTIVE IS A
01:22PM 5 BASIS TO VARY AND NOT JUST THE FINANCIAL MOTIVE, BUT TO BE MORE
01:23PM 6 SPECIFIC, THE DELTA BETWEEN MR. BALWANI'S GAIN AND INVESTOR
01:23PM 7 LOSSES WOULD BE A BASIS TO VARY FROM A GUIDELINE OF LIFE. THAT
01:23PM 8 IS NOT WHERE THE COURT HAS COME DOWN, THOUGH.

01:23PM 9 SO WHEN THE COURT USES ITS GUIDELINE RANGE 135 TO 168,
01:23PM 10 THIS FACTOR IS NO LONGER A FACTOR THAT THE COURT NEEDS TO BASE
01:23PM 11 A VARIANCE UPON BECAUSE THIS NEW GUIDELINE RANGE, 135 TO 168,
01:23PM 12 IS LOWER THAN WHAT 3553(A) SUGGESTS THE COURT SHOULD IMPOSE.

01:23PM 13 3553(A) SUGGESTS THAT THE COURT SHOULD IMPOSE A 15 YEAR
01:23PM 14 SENTENCE, SO AS A RESULT IT IS NO LONGER NECESSARY TO VARY
01:23PM 15 BASED ON THE LACK OF FINANCIAL GAIN TO MR. BALWANI.

01:23PM 16 THE NEXT 3553(A) FACTOR THE COURT IS ASKED TO CONSIDER ARE
01:23PM 17 THE HISTORY AND CHARACTERISTICS OF MR. BALWANI. IN MANY
01:23PM 18 INSTANCES, IN MANY CASES THIS WOULD BE A BASIS TO VARY OR A
01:23PM 19 FACTOR IN MITIGATION. IT ISN'T TRUE HERE, AND IT ISN'T TRUE
01:24PM 20 FOR A COUPLE OF REASONS.

01:24PM 21 FIRST, THE MOST SIGNIFICANT FACTOR IN MR. BALWANI'S FAVOR,
01:24PM 22 THE LACK OF CRIMINAL HISTORY IS COVERED BY THE GUIDELINES.
01:24PM 23 THERE'S SOME INSTANCES IN WHICH THE ADJUSTED OFFENSE LEVEL IS
01:24PM 24 SO HIGH HE GETS NO BENEFIT, IF HE'S IN CRIMINAL HISTORY
01:24PM 25 CATEGORY I OR II, FOR INSTANCE, THE GUIDELINE ADVOCATED BY THE

01:24PM 1 GOVERNMENT, THERE'S NO BENEFIT IF HE'S IN CATEGORY I OR II FOR
01:24PM 2 CRIMINAL HISTORY, SO THE COURT MIGHT THEN THINK IT IS NECESSARY
01:24PM 3 TO INTERVENE AND CREATE A VARIANCE BECAUSE OF THIS MITIGATING
01:24PM 4 FACTOR. THAT ISN'T THE CASE ANY LONGER.

01:24PM 5 THE COURT'S GUIDELINE AT ADJUSTED OFFENSE LEVEL 33 HAS
01:24PM 6 DISTINCTIONS BETWEEN CRIMINAL HISTORY CATEGORIES, SO
01:24PM 7 MR. BALWANI'S NATURE AND HISTORY, HIS PERSONAL CIRCUMSTANCES
01:24PM 8 ACTUALLY CAN BE ACCOUNTED FOR NOW IN THE GUIDELINES.

01:24PM 9 THERE'S ANOTHER REASON, THOUGH, THE COURT SHOULD NOT FIND
01:24PM 10 AS A MITIGATING FACTOR, AND THAT IS THAT MR. BALWANI'S LETTERS
01:24PM 11 OF SUPPORT DEMONSTRATE THE EXISTENCE OF A SUPPORT NETWORK.
01:25PM 12 THAT SUPPORT NETWORK EXISTED DURING THE FRAUD.

01:25PM 13 THE SUPPORT NETWORKS GENERALLY HELP REDUCE RECIDIVISM. WE
01:25PM 14 THINK THAT INDIVIDUALS WHO HAVE THE SUPPORT OF FAMILY OR THEIR
01:25PM 15 LOCAL COMMUNITY WILL BE LESS LIKELY TO TURN TO CRIME POST
01:25PM 16 RELEASE. THAT ISN'T THE CASE HERE, THOUGH. THAT SUPPORT
01:25PM 17 NETWORK EXISTED WHILE MR. BALWANI WAS ENGAGED IN THIS MULTIYEAR
01:25PM 18 FRAUD. AS A RESULT THE COURT SHOULD NOT FIND THAT HIS NATURE
01:25PM 19 AND CIRCUMSTANCES ARE A MITIGATING FACTOR AND CERTAINLY NOT ONE
01:25PM 20 THAT REQUIRES THE COURT TO VARY FROM THE GUIDELINE RANGE THAT
01:25PM 21 IT FOUND.

01:25PM 22 IF WE CONTINUE IN 3553(A) NOW (A) (2), WE'RE ASKED TO LOOK
01:25PM 23 AT THE NEED FOR THE SENTENCE IMPOSED, NOT SOME COLLATERAL
01:25PM 24 CONSEQUENCES OF THIS CASE BUT RATHER THE NEED FOR THE SENTENCE
01:25PM 25 IMPOSED TO REFLECT THE SERIOUSNESS OF THE OFFENSE AND IT IS

FROM THIS PART OF THE STATUTE THAT WE BEGIN OUR DISCUSSION OF
GENERAL DETERRENCE.

IN THIS CASE THERE HAS BEEN SIGNIFICANT MEDIA ATTENTION
AND AS THE CASES SUGGEST, WHITE COLLAR CRIME IS ALSO A
PARTICULAR TYPE OF CRIME THAT CAN BE DETERRED THROUGH GENERAL
DETERRENCE, THIS IS AN AREA IN WHICH THE COURT SHOULD GIVE
PARTICULAR WEIGHT OR EMPHASIS TO GENERAL DETERRENCE BECAUSE A
CALCULATION IS MADE BY THOSE WHO ARE CONTEMPLATING COMMITTING
FRAUD AND TO SOME EXTENT IT'S A ROUGH MATHEMATICAL CALCULATION,
THE RISK OF BEING CAUGHT AND THE POTENTIAL PUNISHMENT VERSUS
THE FINANCIAL GAIN OR THE BENEFIT OF COMMITTING THE CRIME.

THE MEDIA ATTENTION MAGNIFIES THE BENEFITS OF GENERAL
DETERRENCE AND IN SOME INSTANCES THE COURT MAY BE UNCOMFORTABLE
WITH IMPOSING A SIGNIFICANT CUSTODIAL SENTENCE ON AN INDIVIDUAL
IN A CASE WITH MEDIA ATTENTION BECAUSE IT'S HARD FOR THEM TO
CONTROL THE MEDIA ATTENTION. THEY RECEIVE A SIGNIFICANT
SENTENCE IN A CASE FOR A REASON THAT THEY DIDN'T HAVE MUCH
CONTROL OVER.

AS THE COURT KNOWS, THOUGH, THAT ISN'T THE CASE HERE. IN
THIS INSTANCE BOTH MS. HOLMES AND MR. BALWANI USED THE MEDIA TO
PERPETRATE THEIR FRAUD. "THE WALL STREET JOURNAL" ARTICLE IN
2013 THAT THE COURT HEARD ABOUT IN MR. BALWANI'S TRIAL WAS SENT
TO MS. HOLMES AND MR. BALWANI BEFORE IT WAS PUBLISHED, AND IT
WAS REVIEWED, APPROVED, PUBLISHED, CONTAINED FALSE STATEMENTS,
AND THEN WERE SENT, THOSE COPIES OF THE ARTICLE WERE SENT TO

01:27PM 1 INDIVIDUAL INVESTORS.

01:27PM 2 MS. HOLMES AND MR. BALWANI USED THE MEDIA AS PART OF THE
01:27PM 3 FRAUD TO PROVIDE A MEASURE OF LEGITIMACY OR OF CORROBORATION TO
01:27PM 4 STATEMENTS THAT THEY HAD MADE TO INVESTORS AND AS A RESULT HE
01:27PM 5 SHOULDN'T HAVE IT BOTH WAYS. HE SHOULDN'T GET THE BENEFIT FROM
01:27PM 6 HIS USE OF THE MEDIA DURING THE FRAUD BUT NOW AVOID THE
01:27PM 7 OPPORTUNITY THAT IS AVAILABLE TO THE COURT THROUGH GENERAL
01:28PM 8 DETERRENCE AND THE IMPOSITION OF A SIGNIFICANT CUSTODIAL
01:28PM 9 SENTENCE.

01:28PM 10 HIS USE OF THE MEDIA, THOUGH, DOESN'T END THERE. I
01:28PM 11 MENTIONED A MOMENT AGO TRIAL EXHIBIT 2057, THAT'S THE UBS EMAIL
01:28PM 12 THAT ALAN EISENMAN SENT TO MR. BALWANI. AND HERE I WANT TO
01:28PM 13 NOTE JUST SOME OF THE THINGS THAT WERE IN THE UBS CONSULTANT
01:28PM 14 STATEMENTS THAT MR. BALWANI CLAIMED WERE FROM AN UNINFORMED
01:28PM 15 CONSULTANT.

01:28PM 16 ALAN EISENMAN IN HIS UBS REPORT LEARNED THAT BLOOD SAMPLES
01:28PM 17 HAD TO BE SENT TO PALO ALTO. THAT'S TRUE. MR. BALWANI TELLS
01:28PM 18 ALAN EISENMAN THAT THAT SOUNDS LIKE IT'S COMING FROM AN
01:28PM 19 UNINFORMED CONSULTANT.

01:28PM 20 MR. EISENMAN ALSO LEARNED THAT THERANOS TESTING WAS LESS
01:28PM 21 RELIABLE THAN TRADITIONAL TESTING, THAT THAT WAS IN THE UBS
01:28PM 22 REPORT. AGAIN, MR. BALWANI SAYS THAT'S FROM AN UNINFORMED
01:28PM 23 CONSULTANT, EVEN THOUGH WE NOW KNOW THAT TO BE TRUE.

01:28PM 24 AND FINALLY, THE TURN-AROUND TIME WAS OVER 24 HOURS. THE
01:28PM 25 UBS CONSULTANT WRITES THAT. ALAN EISENMAN IS SURPRISED BY THAT

01:29PM 1 BECAUSE THAT'S DIFFERENT THAN WHAT HE UNDERSTOOD WHEN HE WAS
01:29PM 2 MAKING THE DECISION TO INVEST.

01:29PM 3 AND MR. BALWANI, WHEN HE'S CONFRONTED WITH THAT AGAIN,
01:29PM 4 INFORMS MR. EISENMAN THAT THAT ALSO MUST BE FROM AN UNINFORMED
01:29PM 5 CONSULTANT.

01:29PM 6 MR. BALWANI'S USE OF THE MEDIA DOESN'T END THERE. IN HIS
01:29PM 7 ENGAGEMENTS WITH WALGREENS HE SENDS INFORMATION THAT HE FINDS
01:29PM 8 PUBLICALLY AVAILABLE. IT'S TRIAL EXHIBIT 1254. THAT WAS AN
01:29PM 9 ARTICLE THAT APPEARED IN NOVEMBER OF 2013, RIGHT AT THE TIME
01:29PM 10 THAT THERANOS AND WALGREENS ARE GOING LIVE. AND IN THIS
01:29PM 11 PUBLISHED STORY MR. BALWANI READS QUOTE, "NO BOTCHED STICKS, NO
01:29PM 12 PHLEBOTOMISTS, ONLY MACHINES IN THERANOS LABS." MR. BALWANI
01:29PM 13 TAKES THIS ARTICLE AND SENDS IT TO WALGREENS.

01:29PM 14 SO THE USE OF THE MEDIA, THE MANIPULATION OF THE MEDIA TO
01:29PM 15 PERPETUATE THE FRAUD WAS NOT THE EXCLUSIVE PROVINCE OF
01:29PM 16 ELIZABETH HOLMES. MR. BALWANI DID IT ALSO AND DID IT TO GREAT
01:30PM 17 EFFECT. BECAUSE OF THAT THE COURT SHOULD FEEL COMFORTABLE
01:30PM 18 BELIEVING THAT A SENTENCE, A SIGNIFICANT CUSTODIAL SENTENCE
01:30PM 19 HERE WILL SATISFY THE AIMS OF GENERAL DETERRENCE, AND THOSE
01:30PM 20 AIMS WILL BE MAGNIFIED THROUGH THE ADDITIONAL COVERAGE.

01:30PM 21 WE'RE ALSO ASKED UNDER THIS PART OF 3553(A) TO CONSIDER
01:30PM 22 SPECIFIC DETERRENCE. THE DEFENSE IN THEIR FILING ESSENTIALLY
01:30PM 23 GIVES THIS THE BACK OF THE HAND AND SAYS THAT MR. BALWANI,
01:30PM 24 THERE'S NO RISK OF FUTURE FRAUD, AND THAT THE COURT SHOULD PUT
01:30PM 25 NO WEIGHT ON SPECIFIC DETERRENCE. THAT'S WRONG FOR THREE

01:30PM 1 REASONS.

01:30PM 2 FIRST, MR. BALWANI HAS NOT ACKNOWLEDGED HIS ROLE IN THE
01:30PM 3 FRAUD, AND THAT SHOULD PROVIDE SOME MEASURE OF CONCERN TO THE
01:30PM 4 COURT. I'M NOT SAYING THAT THE COURT PUNISHES AN INDIVIDUAL
01:30PM 5 FOR GOING TO TRIAL. IT'S A DIFFERENT ARGUMENT. THE ARGUMENT
01:30PM 6 HERE IS THAT WHEN THE COURT IS DECIDING WHETHER THIS INDIVIDUAL
01:30PM 7 IS LIKELY TO COMMIT FUTURE CRIMES, THE COURT USES THE
01:31PM 8 INFORMATION THAT IS AVAILABLE TO IT TO REACH THAT CONCLUSION.
01:31PM 9 AND SOME OF THE INFORMATION THAT IS AVAILABLE TO THIS COURT IS
01:31PM 10 THAT THIS IS A DEFENDANT WHO HAS NOT ACKNOWLEDGED NOT JUST THAT
01:31PM 11 HE DIDN'T HAVE A ROLE IN A FRAUD, BUT HE'S GOING FURTHER.

01:31PM 12 AND THIS IS MY SECOND POINT. IN THE DEFENSE'S SENTENCING
01:31PM 13 MEMO, THIS IS AT PAGES 25 AND 28, AND AGAIN THIS MORNING
01:31PM 14 THEY'VE REPEATED THIS ARGUMENT. AND IT GOES LIKE THIS,
01:31PM 15 MR. BALWANI LEFT THERANOS AT A TIME WHEN IT HAD X DOLLARS,
01:31PM 16 \$300 MILLION IN THE BANK, AND HE ISN'T RESPONSIBLE FOR WHAT
01:31PM 17 HAPPENED TO THAT MONEY. IN FACT, MS. HOLMES, THE BOARD OF
01:31PM 18 DIRECTORS, AND THE INVESTORS ARE THE ONES WHO DECIDED HOW TO
01:31PM 19 SPEND THAT MONEY, AND IT IS THEIR FAULT THAT MORE OF THE LOSSES
01:31PM 20 WEREN'T RECOUPED, THAT THE LOSSES TO THE INVESTORS ARE THE
01:31PM 21 RESULT OF THE ACTIONS OF THE INDIVIDUALS WHO REMAINED AT
01:31PM 22 THERANOS AFTER MR. BALWANI LEFT.

01:32PM 23 MR. BALWANI ISN'T EVEN ACKNOWLEDGING TO THE COURT THAT HE
01:32PM 24 WAS PRESENT AT THE SCENE OF A CRIME. IT'S A DIFFERENT THING TO
01:32PM 25 SAY I HAD A ROLE IN THE FRAUD, AND HE CERTAINLY ISN'T SAYING

01:32PM 1 THAT, BUT HE'S NOW GONE ONE FURTHER AND IS TELLING THIS COURT
01:32PM 2 THERANOS WAS NOT THE SCENE OF THE CRIME UNTIL I LEFT. UNTIL I
01:32PM 3 LEFT, THERE WAS \$300 MILLION LEFT IN THE BANK, AND THAT COULD
01:32PM 4 HAVE BEEN USED TO PAY BACK THE INVESTORS SO THERE WOULD HAVE
01:32PM 5 BEEN NO LOSS HERE.

01:32PM 6 WHEN HE GOES FURTHER AND MAKES THIS ARGUMENT TO THE COURT,
01:32PM 7 THE COURT SHOULD BE ADDITIONALLY CONCERNED ABOUT WHETHER A
01:32PM 8 SPECIFIC DETERRENCE IS NECESSARY, BECAUSE HE WON'T ACKNOWLEDGE
01:32PM 9 THAT THE MONEY IN THE BANK WAS THE RESULT OF FRAUD. HE CAN
01:32PM 10 STILL MAINTAIN HIS POSITION THAT HE DIDN'T COMMIT FRAUD OR THAT
01:32PM 11 HE DIDN'T HAVE A ROLE IN IT AND THAT WAS ALL MS. HOLMES OR SOME
01:32PM 12 OTHER VERSION, BUT HE'S ACTUALLY GONE FURTHER NOW AND IS
01:32PM 13 TELLING THE COURT THAT MONEY IN THE BANK WAS MONEY THAT
01:32PM 14 THERANOS WAS ENTITLED TO HAVE AND SHOULD HAVE BEEN OR COULD
01:32PM 15 HAVE BEEN DISBURSED TO INVESTORS, AND AMONG THESE INDIVIDUALS,
01:33PM 16 AMONG THE GROUPS THAT HE BLAMES FOR NOT DOING THE RIGHT THING
01:33PM 17 WITH THAT MONEY IS THE INVESTORS THEMSELVES. AND THE COURT
01:33PM 18 SHOULD BE CONCERNED ABOUT THAT KIND OF ARGUMENT WHEN IT'S
01:33PM 19 THINKING ABOUT WHETHER SPECIFIC DETERRENCE IS RELEVANT, IS A
01:33PM 20 FACTOR THAT IT SHOULD USE TO EITHER AGGRAVATE OR MITIGATE A
01:33PM 21 SENTENCE OUTSIDE OR WITHIN THE GUIDELINES.

01:33PM 22 THE THIRD REASON WHY A SPECIFIC DETERRENCE MATTERS IS A
01:33PM 23 REASON -- AN ARGUMENT I MADE A MOMENT AGO, SO I'LL TOUCH IT
01:33PM 24 BRIEFLY, AND THAT IS THE EXTENSIVE SUPPORT NETWORK THAT EXISTED
01:33PM 25 DURING THE TIME OF THE FRAUD HAS RELEVANCE TO SPECIFIC

01:33PM 1 DETERRENCE. THE EXTENSIVE NETWORK EXISTED DURING THE FRAUD,
01:33PM 2 DID NOT DETER THE FRAUD, AND AS A RESULT, ONE OF THE CHECKS
01:33PM 3 THAT THE COURT MAY HAVE TO FEEL COMFORTABLE THAT SPECIFIC
01:33PM 4 DETERRENCE ISN'T NECESSARY IN SOME CASES IS ABSENT HERE, THE
01:33PM 5 NETWORK EXISTED AND DID NOT PREVENT THE FRAUD.

01:34PM 6 I WANT TO MOVE ON TO THE NEXT FACTOR WHICH IS PROMOTING
01:34PM 7 RESPECT FOR THE LAW AND PROVIDING JUST PUNISHMENT FOR THE
01:34PM 8 OFFENSE. AND FOR THIS ONE I WANT TO REMIND THE COURT OF THE
01:34PM 9 REAL HARMS THAT OCCURRED HERE. FOR THE INVESTOR SIDE, THE
01:34PM 10 INVESTORS LOST MILLIONS OF DOLLARS. THAT IS ITSELF A
01:34PM 11 SIGNIFICANT HARM DESERVING OF A SIGNIFICANT CUSTODIAL SENTENCE,
01:34PM 12 BUT IT ALSO HAS A ROLE BECAUSE THE MONEY THAT WAS INVESTED HERE
01:34PM 13 HAD SIGNIFICANT OPPORTUNITY COST. MUCH OF THE MONEY THAT WAS
01:34PM 14 INVESTED IN THERANOS, IF IT DIDN'T GO TO THERANOS, IT COULD
01:34PM 15 HAVE GONE TO OTHER LEGITIMATE TECHNOLOGICAL INNOVATIONS WITH
01:34PM 16 COMPANIES, ESPECIALLY COMPANIES HERE IN SILICON VALLEY, THAT
01:34PM 17 HAD REAL COMPANIES, THAT COULD DO REAL GOOD IN THE WORLD.

01:34PM 18 THE INVESTORS THOUGHT THAT WHAT THEY WERE INVESTING IN WAS
01:34PM 19 ONE OF THOSE COMPANIES. AND THE REASONS THEY THOUGHT THAT IS
01:34PM 20 BECAUSE SOME OF THE STATEMENTS THAT MR. BALWANI HIMSELF MADE TO
01:34PM 21 INVESTORS WERE CREATED, WERE BIRTHED WITH THAT IDEA IN MIND TO
01:34PM 22 MAKE INVESTORS THINK THAT WHAT THEY WERE INVESTING IN WAS A
01:34PM 23 COMPANY WITH REAL TECHNOLOGY THAT COULD AFFECT THE FUTURE OF
01:35PM 24 HEALTH CARE. INSTEAD INVESTORS INVESTED IN A FRAUD. THEIR
01:35PM 25 MONEY COULD HAVE GONE TO A REAL COMPANY THAT COULD HAVE

01:35PM 1 AFFECTED HEALTH CARE IN THE FUTURE.

01:35PM 2 THERE'S ALSO REAL HARM ON THE PATIENT SIDE. THE COURT
01:35PM 3 HEARD FROM PATIENTS DURING MR. BALWANI'S TRIAL WHO TESTIFIED
01:35PM 4 ABOUT THEIR EXPERIENCES. I WON'T REPEAT ALL OF THEM, BUT THE
01:35PM 5 COURT KNOWS THAT INDIVIDUALS WHO RECEIVED BLOOD TEST RESULTS
01:35PM 6 FROM THERANOS MADE MEDICAL DECISIONS BASED ON THOSE BLOOD TEST
01:35PM 7 RESULTS.

01:35PM 8 IT IS NOT AN INTELLECTUAL LEAP TO SEE THE HARM. IT IS THE
01:35PM 9 DIRECT RESULT. ONE CAUSE OR IMPLIED THE OTHER IN THIS CASE.
01:35PM 10 AND INDIVIDUALS RECEIVED TEST RESULTS THAT WERE INCORRECT AND
01:35PM 11 MADE MEDICAL DECISIONS BASED UPON THAT INCORRECT INFORMATION.
01:35PM 12 THAT, TOO, IS A SIGNIFICANT REAL HARM THAT THIS COURT MUST
01:35PM 13 ADDRESS THROUGH ITS SIGNIFICANT CUSTODIAL SENTENCE.

01:36PM 14 THE LAST FACTOR I WANT TO TURN TO IS (A) (6), 3553(A) (6).
01:36PM 15 AND THE REASON I WANT TO TOUCH ON THIS ONE IS BECAUSE WE NOW
01:36PM 16 HAVE THE SENTENCE IMPOSED IN MS. HOLMES'S CASE. AND THIS
01:36PM 17 FACTOR INFORMS US THAT WE SHOULD AVOID UNWARRANTED SENTENCE
01:36PM 18 DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN
01:36PM 19 FOUND GUILTY OF SIMILAR CONDUCT.

01:36PM 20 UNWARRANTED IS THE IMPORTANT WORD HERE. MS. HOLMES
01:36PM 21 RECEIVED A SENTENCE OF 135 MONTHS. THE GOVERNMENT IS ASKING
01:36PM 22 THE COURT TO SENTENCE MR. BALWANI HIGHER THAN THAT, TO A
01:36PM 23 SENTENCE OF 180 MONTHS, AND THAT IS A DISPARITY. THOSE NUMBERS
01:36PM 24 ARE DIFFERENT, IT IS NOT UNWARRANTED, AND IT IS NOT UNWARRANTED
01:36PM 25 FOR SEVERAL REASONS.

01:36PM 1 FIRST, MR. BALWANI PLAYED A SIGNIFICANT ROLE IN BOTH THE
01:36PM 2 PATIENT FRAUD AND ALSO THE INVESTOR FRAUD. I'VE IDENTIFIED
01:36PM 3 SPECIFIC PLACES OR SPECIFIC ROLES THAT MR. BALWANI PLAYED, SO
01:37PM 4 I'M NOT GOING TO REPEAT THOSE NOW, BUT IT IS RELEVANT AS THE
01:37PM 5 COURT ANALYZES WHETHER THERE'S A WARRANTED OR AN UNWARRANTED
01:37PM 6 DISPARITY BETWEEN MS. HOLMES AND MR. BALWANI SHOULD THE COURT
01:37PM 7 IMPOSE A SENTENCE LIKE THE ONE THAT THE GOVERNMENT IS
01:37PM 8 ADVOCATING FOR.

01:37PM 9 THE REASON THAT IT WOULD NOT BE UNWARRANTED IS BECAUSE
01:37PM 10 WHEN THE COURT SENTENCED MS. HOLMES, EVEN THOUGH IT COULD
01:37PM 11 CONSIDER AS RELEVANT CONDUCT ACQUITTED CONDUCT, THE COURT CHOSE
01:37PM 12 NOT TO. THE COURT CHOSE TO SENTENCE MS. HOLMES BASED UPON THE
01:37PM 13 CONVICTED CONDUCT THAT WAS LIMITED TO THE INVESTOR FRAUD.

01:37PM 14 MR. BALWANI, AS THE COURT KNOWS, WAS CONVICTED OF ALL
01:37PM 15 COUNTS IN THE INDICTMENT. THAT INCLUDED THE PATIENT FRAUD.
01:37PM 16 AND IT IS NOT JUST THE COUNTS OF CONVICTION THAT MATTERED, BUT
01:37PM 17 THE COURT SAW THE EVIDENCE IN THE CASE. THE COURT SAW THE ROLE
01:37PM 18 THAT MR. BALWANI PLAYED IN THE LAB.

01:37PM 19 MR. BALWANI FIRED INDIVIDUALS WHO EXPRESSED DISSENT, HE
01:37PM 20 TOLD INDIVIDUALS WHO EXPRESSED DISSENT THAT THEIR JOB WAS
01:38PM 21 SIMPLY TO PROCESS PATIENT SAMPLES, HE REPLACED ENGAGED LAB
01:38PM 22 DIRECTORS WITH UNENGAGED LAB DIRECTORS, AND IT'S ALL OF THOSE
01:38PM 23 REASONS WHY THE COURT SHOULD FEEL COMFORTABLE THAT MR. BALWANI
01:38PM 24 SHOULD RECEIVE A MORE SIGNIFICANT SENTENCE THAN MS. HOLMES AND
01:38PM 25 THAT DISPARITY WOULD NOT BE UNWARRANTED.

MR. BALWANI ALSO PLAYED, AND I WANT TO HIGHLIGHT THIS, A
ROLE IN THE WALGREENS ROLLOUT THAT THE COURT HEARD SIGNIFICANT
EVIDENCE IN HIS TRIAL ABOUT.

MR. BALWANI WAS THE POINT PERSON AT THERANOS, AND
MR. JHAVERI WAS THE POINT PERSON AT WALGREENS, AND THE TWO OF
THEM WORKED TO OPERATIONALIZE THE ROLLOUT. THAT ROLLOUT PLAYED
A SIGNIFICANT ROLE IN BOTH FRAUDS.

I TOUCHED ON THIS EARLIER THAT INVESTORS INVESTED BECAUSE
THEY SAW AND HEARD THAT THE ROLLOUT WITH WALGREENS WAS GOING
WELL, AND THEY WERE TOLD THAT THE ROLLOUT WITH WALGREENS WAS
EXPANDING.

THEY ALSO -- THE WALGREENS ROLLOUT ALSO CREATED THE
OPPORTUNITY FOR THE PATIENTS TO BE DEFRAUDED, TO GET THE
INACCURATE BLOOD TEST RESULTS.

MR. BALWANI'S ROLE, THE INTEGRAL ROLE THAT HE PLAYED IN
THE WALGREENS ROLLOUT AFFECTED BOTH FRAUDS, THE PATIENT FRAUD
AND THE INVESTOR FRAUD AND BECAUSE THAT PLAYED SUCH A
SIGNIFICANT ROLE IN BOTH FRAUDS, THE COURT SHOULD FEEL
COMFORTABLE IMPOSING A MORE SIGNIFICANT CUSTODIAL SENTENCE ON
MR. BALWANI THAN IT DID ON MS. HOLMES, AND THAT THAT DIFFERENCE
WOULD NOT BE AN UNWARRANTED SENTENCE DISPARITY.

THE LAST ISSUE I'LL TOUCH ON IS MR. BALWANI ADDRESSES
BASES FOR VARIANCE IN HIS MEMO, AND HE ESSENTIALLY SAYS THAT HE
INVESTED HIS OWN MONEY, THE MILLIONS OF DOLLARS, AND HE NEVER
SOUGHT FAME OR RECOGNITION, AND THAT HE HAS A LONG HISTORY OF

01:39PM 1 CHARITABLE GIVING. IT IS THESE THREE PILLARS UPON WHICH THE
01:39PM 2 DEFENSE'S VARIANCE REQUEST IS BASED.

01:40PM 3 THE COURT SHOULD REJECT THEM AND DETERMINE THAT A SENTENCE
01:40PM 4 WITHIN THE GUIDELINE, WITHIN THE GUIDELINES THAT THE GOVERNMENT
01:40PM 5 RECOMMENDED WOULD BE LIFE. THE GUIDELINES THAT THE COURT FOUND
01:40PM 6 135 TO 168 ARE MORE APPROPRIATE THAN ONE LIKE THE DEFENSE IS
01:40PM 7 ASKING FOR, WHICH IS A SENTENCE OF PROBATION. NOT ONLY WOULD A
01:40PM 8 SENTENCE OF PROBATION IGNORE ALL OF THE PRIOR 3553(A) FACTORS
01:40PM 9 THAT I JUST COVERED WITH THE COURT, BUT IT ALSO ASSUMES THAT
01:40PM 10 THESE ARE PROPER BASES FOR VARIANCE, THAT MR. BALWANI'S
01:40PM 11 INVESTMENT OF HIS OWN MONEY, HE ARGUES, UNLIKE
01:40PM 12 ELIZABETH HOLMES, MR. BALWANI INVESTED HIS OWN MONEY.

01:40PM 13 THE COURT KNOWS FROM INFORMATION THAT IT RECEIVED DURING
01:40PM 14 THE COURSE OF THE TRIAL, MR. BALWANI HAD THE ABILITY TO INVEST
01:40PM 15 HIS OWN MONEY. IT SHOULD NOT REWARD HIM FOR THAT. IT, IN
01:40PM 16 FACT, SHOULD CAUSE THE COURT TO QUESTION HOW MR. BALWANI COULD
01:40PM 17 HAVE MADE THESE CHOICES. WHY IT IS THAT MR. BALWANI, WHEN
01:40PM 18 FACED WITH THERANOS POTENTIALLY RUNNING OUT OF ITS RUNWAY, WHY
01:41PM 19 HE CHOSE TO DEFRAUD INVESTORS, WHY HE CHOSE TO DEFRAUD
01:41PM 20 PATIENTS? THERE SIMPLY IS NO ANSWER TO THAT QUESTION.

01:41PM 21 THAT HE DID NOT SEEK FAME OR RECOGNITION IS NOT SOMETHING
01:41PM 22 THAT AT THIS STAGE HE SHOULD GET CREDIT FOR.

01:41PM 23 MR. BALWANI HELD ON TO HIS SHARES BECAUSE WHEN HE HAD --
01:41PM 24 BECAUSE WHEN HE POSSESSED THEM DURING THE FRAUD, THEY WERE
01:41PM 25 WORTH HUNDREDS OF MILLIONS OF DOLLARS, AND MR. BALWANI WANTED

01:41PM 1 BILLIONS OF DOLLARS. HE HELD ON TO THEM BECAUSE HE ASSUMED, HE
01:41PM 2 THOUGHT THAT THERANOS WOULD OUTLIVE THE FRAUD, THAT EVENTUALLY
01:41PM 3 THERANOS COULD BECOME WHAT HE WAS TELLING INDIVIDUALS THERANOS
01:41PM 4 WAS, AND IF HE WAS SUCCESSFUL, HE WAS TAKING A RISK AND HE WAS
01:41PM 5 PLAYING THE GAME THAT EVENTUALLY WE WILL BE WHAT WE CLAIM TO BE
01:41PM 6 AND I WILL HAVE SHARES THAT ARE WORTH BILLIONS OF DOLLARS
01:41PM 7 INSTEAD OF MILLIONS.

01:41PM 8 SO THAT HE DID NOT SEEK FAME OR SOUGHT TO RECEIVE SOME
01:41PM 9 MEASURE OF RECOGNITION FOR IT IS NOT A BASIS FOR THE COURT NOW
01:42PM 10 TO DETERMINE HE DESERVES A VARIANCE AND CERTAINLY NOT ONE TO
01:42PM 11 PROBATION, WHICH IS WHAT THE DEFENSE IS ASKING FOR.

01:42PM 12 HIS HISTORY OF CHARITABLE GIVING IS CERTAINLY LAUDABLE. I
01:42PM 13 DON'T HAVE ANY ADDITIONAL WORDS TO SAY ON THAT OTHER THAN IT IS
01:42PM 14 NOT A BASIS TO VARY OUTSIDE OF THE GUIDELINES THAT THE COURT
01:42PM 15 HAS FOUND, IT IS NOT A BASIS TO VARY BEYOND THE 180 MONTHS THAT
01:42PM 16 THE GOVERNMENT IS ASKING THE COURT TO IMPOSE, AND IT IS
01:42PM 17 CERTAINLY NOT A BASIS TO VARY DOWN TO PROBATION AS THE DEFENSE
01:42PM 18 IS ASKING FOR.

01:42PM 19 BEYOND THAT, I'LL SUBMIT AND ENCOURAGE THE COURT TO IMPOSE
01:42PM 20 A SIGNIFICANT CUSTODIAL SENTENCE REQUESTED BY THE GOVERNMENT.
01:42PM 21 THANK YOU.

01:42PM 22 THE COURT: THANK YOU.

01:42PM 23 DOES DEFENSE WISH TO BE HEARD?

01:42PM 24 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

01:43PM 25 SO THANK YOU FOR THE OPPORTUNITY, YOUR HONOR. AND AFTER

01:43PM 1 ALL OF THIS TIME, WE'VE FINALLY REACHED THIS POINT. THIS IS
01:43PM 2 OBVIOUSLY A DECISION THAT AFFECTS A REAL HUMAN BEING,
01:43PM 3 MR. BALWANI. THIS IS, AT THIS TIME, NOT A MATTER OF
01:43PM 4 CALCULATING DECIMAL POINTS AND NUMBERS. IT'S ABOUT WHO
01:43PM 5 MR. BALWANI IS AND WHAT SENTENCE HE SHOULD RECEIVE.

01:43PM 6 THE REASON I SAY THAT IN PART, YOUR HONOR, IS BECAUSE IN
01:43PM 7 LISTENING TO MR. SCHENK, I FEEL LIKE WE'RE BACK IN THE
01:43PM 8 PRE-BOOKER WORLD WHERE SOMEHOW THE GUIDELINES ARE PRESUMED
01:43PM 9 REASONABLE AND THEY'RE OVERRIDINGLY THE MOST IMPORTANT THING,
01:43PM 10 AND THEN WE HAVE TO JUSTIFY VARIANCES.

01:43PM 11 I UNDERSTAND THE GUIDELINES UNDER THE PRECEDENT THAT EXIST
01:43PM 12 ARE A STARTING POINT. FOR THE RECORD, WE DON'T EVEN AGREE WITH
01:43PM 13 THAT, THAT THEY SHOULD BE. BUT WE UNDERSTAND THAT'S WHERE THE
01:43PM 14 COURT STARTS.

01:43PM 15 BUT THEY ARE A STARTING POINT. THERE'S NO PRESUMPTION
01:43PM 16 THAT THEY'RE REASONABLE. THEY'RE JUST ONE FACTOR AMONG ALL OF
01:44PM 17 THE 3553(A) FACTORS.

01:44PM 18 SO WHEN MR. SCHENK SAYS, WELL, HE THINKS THE GUIDELINES
01:44PM 19 ARE LIFE AND HE'S DOING US A FAVOR BY RECOMMENDING 15 YEARS,
01:44PM 20 THAT'S JUST OVERLY RELATED TO THE GUIDELINES AND NOT
01:44PM 21 APPROPRIATE IN TODAY'S SENTENCING WORLD.

01:44PM 22 THE OTHER THING THAT I WANT TO JUST OBSERVE IN GENERAL IS
01:44PM 23 THAT THE GOVERNMENT SAID A LOT OF THINGS AT TRIAL. AND AS THE
01:44PM 24 COURT REMEMBERED, THERE WERE A LOT OF THINGS THAT THE
01:44PM 25 GOVERNMENT DID, AND THEY ARE ENTITLED TO MAKE A STRATEGIC

01:44PM 1 CHOICE WHERE THEY DECIDED TO PRESENT EVIDENCE AND NOT PRESENT
01:44PM 2 THE OTHER SIDE. THEY DIDN'T, IN OTHER WORDS, FRONT THINGS AS
01:44PM 3 SOMETIMES LAWYERS DO.

01:44PM 4 AND THEY ARE NOW ASSUMING BECAUSE OF THE JURY VERDICT,
01:44PM 5 WHICH IS AGAIN A GENERAL VERDICT, THAT EVERY SINGLE FACT THAT
01:44PM 6 THEY PUT INTO PLAY AT TRIAL IS SOMEHOW FOUND BEYOND A
01:44PM 7 REASONABLE DOUBT. THAT IS NOT THE CASE.

01:44PM 8 AND THEY'RE DOING THAT TODAY, AND THEY'VE DONE THAT
01:44PM 9 REPEATEDLY.

01:44PM 10 SO, FOR EXAMPLE, WHEN THE GOVERNMENT SAYS THAT MR. BALWANI
01:45PM 11 DIDN'T HAVE ANY BASIS TO THINK THAT THE WALGREENS RELATIONSHIP
01:45PM 12 WOULD CONTINUE TO GROW AFTER -- GIVEN HIS DEALINGS WITH
01:45PM 13 MR. JHAVERI AT WALGREENS, IN FACT, MR. JHAVERI SENT MR. BALWANI
01:45PM 14 AN EMAIL THAT SAID IN AUGUST OF 2014, SAID WE ARE GOING TO
01:45PM 15 TOUCH 2500 STORES IN 2015. AND MR. JHAVERI DID THAT WITH FULL
01:45PM 16 KNOWLEDGE OF WHAT THE FINGERSTICK PERCENTAGES WERE AND SOME OF
01:45PM 17 THE DIFFICULTIES IN GETTING THAT FINGERSTICK PERCENTAGE DOWN TO
01:45PM 18 WHERE BOTH SIDES WANTED TO TARGET IT, WHICH BY THE WAY IN THE
01:45PM 19 EVIDENCE OF THE CASE WAS NOT REQUIRED BY WALGREENS UNTIL AUGUST
01:45PM 20 OF 2015. SO THERE WAS PLENTY OF TIME.

01:45PM 21 BUT I ONLY RAISE THAT ONE THING, YOUR HONOR, AS AN
01:45PM 22 ILLUSTRATION THAT NOT EVERYTHING THAT THE GOVERNMENT PRESENTED
01:45PM 23 AT TRIAL IS TRUE. THERE WAS DEFENSE EVIDENCE AND THE
01:45PM 24 GOVERNMENT IS TRYING TO IGNORE. SO THERE'S A MUCH MORE NUANCED
01:45PM 25 BALANCED LOOK AT THIS THAT IS REQUIRED THAN WHAT THE GOVERNMENT

01:46PM 1 SAYS.

01:46PM 2 LET ME JUST SORT OF GO BACK TO FIRST PRINCIPLES. SO THE
01:46PM 3 NATURE AND CIRCUMSTANCES OF THE OFFENSE. MR. BALWANI, AS
01:46PM 4 MR. SCHENK HAS TO CONCEDE, DID NOT JOIN THERANOS BECAUSE HE WAS
01:46PM 5 TRYING TO DEFRAUD ANYONE. IN FACT, BY THE TIME THAT
01:46PM 6 MR. BALWANI JOINED THERANOS, HE HAD ACCOMPLISHED EDUCATIONAL
01:46PM 7 ACHIEVEMENTS, HE HAD ACCOMPLISHED BUSINESS ACHIEVEMENTS, HE HAD
01:46PM 8 OBTAINED DEGREES. HIS STORY IS REALLY A CLASSIC AMERICAN
01:46PM 9 SUCCESS STORY OF A MAN WHO CAME HERE AS A YOUNG PERSON TO GO TO
01:46PM 10 COLLEGE HERE IN THE UNITED STATES AND STUDIED HARD AND WORKED
01:46PM 11 HARD AND MOVED HERE TO SILICON VALLEY AND STARTED A COMPANY AND
01:46PM 12 WAS SUCCESSFUL.

01:46PM 13 AS MR. SCHENK SAID, HE LATER JOINED THERANOS IN 2009 NOT
01:46PM 14 TO DEFRAUD ANYONE, SO RIGHT AWAY HE DOESN'T HAVE ANY KIND OF
01:46PM 15 BACKGROUND IN THIS. MS. HOLMES OBVIOUSLY FOUNDED THE COMPANY
01:47PM 16 MUCH EARLIER.

01:47PM 17 SO HE JOINS THERANOS. SO WHAT DOES HE DO? HE DOES SOME
01:47PM 18 DUE DILIGENCE AS WE'VE POINTED OUT. HE DOES A LOT OF DUE
01:47PM 19 DILIGENCE. HE ASKS A LOT OF QUESTIONS. HE MEETS WITH A LOT OF
01:47PM 20 THE LEADING PEOPLE AT THERANOS. HE MEETS WITH
01:47PM 21 CHANNING ROBERTSON, AN ENGINEER PROFESSOR AT STANFORD WHO TELLS
01:47PM 22 HIM THINGS ARE GREAT, AND HE DECIDES TO JOIN.

01:47PM 23 ALL OF THE EVIDENCE HERE POINTS TO THE FACT THAT
01:47PM 24 MR. BALWANI JOINED THIS COMPANY BECAUSE HE BELIEVED IN THE
01:47PM 25 MISSION OF THERANOS, HE HAD SOME FAMILY HISTORY, HIS FATHER

01:47PM 1 DIED AT A RELATIVELY YOUNG AGE, AND HE HAD SOME FAMILY HISTORY
01:47PM 2 THAT WANTED HIM TO CONTRIBUTE.

01:47PM 3 AND THIS WAS NOT UNUSUAL FOR MR. BALWANI. HE HAD BEEN
01:47PM 4 CONTRIBUTING HIS WHOLE LIFE. AS THE COURT HAS SEEN FROM THE
01:47PM 5 LETTERS THAT WE HAVE SUBMITTED, MR. BALWANI HAS A LONG HISTORY
01:47PM 6 OF GIVING.

01:47PM 7 MR. SCHENK SAYS, WELL, THAT'S NOT A FACTOR THAT THE COURT
01:47PM 8 SHOULD CONSIDER. IT'S LAUDABLE, BUT, YOU KNOW, IT'S ABOUT WHO
01:47PM 9 MR. BALWANI IS. SO IT IS A VERY IMPORTANT FACTOR TO LOOK AT
01:47PM 10 THE WHOLE PERSON HERE.

01:47PM 11 AND WHAT MR. BALWANI DID WITH HIS CHARITABLE GIVING LONG
01:48PM 12 BEFORE THERANOS, AND INCLUDING WHILE HE WAS INVOLVED WITH
01:48PM 13 THERANOS AND EVEN AFTER THAT, WAS HE TRIED TO -- YOU CAN SEE,
01:48PM 14 IT'S HELPING AN ORGANIZATION BUILD A COMMUNITY KITCHEN TO FEED
01:48PM 15 PEOPLE WHO NEEDED HELP, IT'S HELPING A VILLAGE GET A WATER PUMP
01:48PM 16 SO IT CAN SUPPLY WATER TO ITS INHABITANTS, IT'S CONTRIBUTING
01:48PM 17 MONEY SO THAT WHEELCHAIRS CAN BE PROVIDED TO PEOPLE WHO NEED TO
01:48PM 18 USE WHEELCHAIRS, AND IT'S VOLUNTEERING IN A CHARITABLE KITCHEN
01:48PM 19 TO ACTUALLY HELP HANDS ON FEED HOMELESS PEOPLE. HE DID ALL OF
01:48PM 20 THAT WITHOUT ANY REQUEST FOR RECOGNITION. HE DIDN'T WANT HIS
01:48PM 21 NAME ON A BUILDING. NOTHING. HE JUST WANTED TO HELP, AND
01:48PM 22 THAT'S WHY HE JOINED THERANOS BECAUSE HE WANTED TO HELP. HE
01:48PM 23 WANTED TO CONTRIBUTE.

01:48PM 24 NOW, HE NOT ONLY CONTRIBUTED BY JOINING AND WORKING AND
01:48PM 25 ROLLING UP HIS SLEEVES AND TRY TO MAKE THIS COMPANY AS GOOD AS

01:48PM 1 COULD BE, HE ALSO INVESTED A LOT OF MONEY. SO HE NOT ONLY
01:49PM 2 TALKED THE TALK, HE WALKED THE WALK. HE PUT IN, AS THE COURT
01:49PM 3 SAW, WELL OVER \$4 AND A HALF MILLION. HE ALSO GUARANTEED A
01:49PM 4 LOAN WHICH SOHAN SPIVEY TESTIFIED AT TRIAL WAS THE SAME
01:49PM 5 ECONOMICALLY AS MR. BALWANI LOANING MONEY TO THE COMPANY.

01:49PM 6 SO HE LOANS MONEY. HE'S ON THE HOOK FOR \$12 MILLION AND
01:49PM 7 THAT HE COULD HAVE LOST AND FORTUNATELY HE DIDN'T LOSE THAT
01:49PM 8 MONEY. HE DID LOSE THE 4 AND A HALF MILLION, MORE THAN THAT
01:49PM 9 THAT, HE INVESTED, PLUS THE MONEY THAT HE GAVE MS. HOLMES SO
01:49PM 10 SHE COULD BUY COMPANY STOCK. SO MR. BALWANI ACTUALLY INVESTED
01:49PM 11 THAT MONEY.

01:49PM 12 MR. SCHENK SAYS, WELL, IT IS TRUE THAT HE NEVER SOLD A
01:49PM 13 SHARE, THAT IS TRUE, BUT SOMEHOW MR. SCHENK TURNS THAT AROUND
01:49PM 14 INTO AN AGGRAVATING FACTOR BECAUSE HE WAS SOMEHOW GREEDY WHERE
01:49PM 15 HE WANTED EVEN MORE BILLIONS SO HE WASN'T EVEN WILLING TO PART
01:49PM 16 WITH A SINGLE SHARE. THERE'S NO EVIDENCE OF THAT. IT'S POOR
01:49PM 17 SPECULATION.

01:49PM 18 NOTHING IN MR. BALWANI'S HISTORY FROM THE FACT THAT HE
01:50PM 19 GAVE OVER AND OVER AGAIN FOR A LONG PERIOD OF TIME WITH
01:50PM 20 CHARITABLE GIVING WITHOUT ASKING FOR ANYTHING. HE INVESTED IN
01:50PM 21 THERANOS, HE ASKED FOR A SALARY OF ONE DOLLAR WHEN HE JOINED
01:50PM 22 THERANOS. NOTHING IN THIS RECORD SUPPORTS THE IDEA THAT
01:50PM 23 MR. BALWANI IS GREEDY, AND THE REASON HE DIDN'T SELL SHARES IS
01:50PM 24 BECAUSE HE WANTED TO MAKE MORE BILLIONS. AND IT'S NOT ALL OR
01:50PM 25 NOTHING BY THE WAY, YOUR HONOR.

01:50PM 1 MR. SCHENK AND THE GOVERNMENT POINT TO, WELL,
01:50PM 2 MR. BALWANI'S INVESTMENT IN THERANOS WAS RELATIVELY EARLY, IN
01:50PM 3 2009 AND 2010, AND SO WHAT ABOUT 2013, 2014, 2015? MR. BALWANI
01:50PM 4 HAD ALL OF THESE SHARES WORTH HALF A BILLION DOLLARS, AND IF
01:50PM 5 YOU'RE TRYING TO DEFRAUD PEOPLE, COULD YOU HAVE SOLD ONE SHARE?
01:50PM 6 TEN SHARES? A HUNDRED SHARES? FIVE THOUSAND SHARES? IT WOULD
01:50PM 7 BE A BASIC. NO ONE WOULD BAT AN EYELASH IF SOMEONE WHO OWNED
01:50PM 8 THAT MANY SHARES IN A COMPANY THAT'S A HOT COMPANY AT THE TIME
01:50PM 9 WANTED TO DIVERSIFY THEIR PORTFOLIO A BIT YOU HAD TO SELL EVERY
01:50PM 10 SINGLE SHARE.

01:51PM 11 THIS IDEA THAT HE HELD ON TO THE SHARES BECAUSE HE WANTED
01:51PM 12 TO MAKE EVEN MORE BILLIONS, MR. SCHENK SAID THAT'S AN
01:51PM 13 AGGRAVATING FACTOR, THERE'S NO EVIDENCE OF THAT. IT'S
01:51PM 14 BASICALLY MADE UP.

01:51PM 15 WHAT WE'VE GOT HERE AND THE REASON I'M TELLING YOU THIS,
01:51PM 16 YOUR HONOR, AND THE COURT KNOWS THIS FROM TRIAL IS THAT WE HAVE
01:51PM 17 A CASE THAT IS VERY UNUSUAL HERE. IT'S OUTSIDE OF THE
01:51PM 18 HEARTLAND. IT'S ATYPICAL OF THE FRAUD CASES THAT THIS COURT
01:51PM 19 AND COURTS ALL OVER THIS COUNTRY SEE EVERY SINGLE DAY, AND THAT
01:51PM 20 IS THE PRIMARY DRIVING MOTIVE OF FRAUD IS GREED, IS TO PUT
01:51PM 21 YOURSELF FIRST, IS TO MAKE MONEY BEFORE OTHERS.

01:51PM 22 THERE ARE MANY DEFENDANTS THAT I'M SURE THIS COURT HAS
01:51PM 23 SEEN AND CERTAINLY I HAVE SEEN AS AN ATTORNEY WHERE IF YOU GET
01:51PM 24 THE VICTIM'S MONEY, IT'S A WIN. AND IF YOU ARE ABLE TO BUY A
01:51PM 25 HOUSE OR A BOAT OR TAKE A GREAT VACATION, THAT'S A WIN.

01:51PM 1 THERE IS NOTHING IN THIS RECORD THAT SUPPORTS IN ANY WAY
01:51PM 2 THAT MR. BALWANI WAS MOTIVATED BY THOSE THINGS. HE DIDN'T DO
01:51PM 3 THOSE THINGS. HE DIDN'T MAKE ANYTHING AT THERANOS. IN FACT,
01:52PM 4 HE WAS AN INVESTOR IN THERANOS WHO LOST A LOT OF MONEY, AND
01:52PM 5 OBVIOUSLY HE WORKED FOR THE COMPANY AS WELL, AND WE CAN TALK
01:52PM 6 ABOUT THAT.

01:52PM 7 BUT THERE'S NO GREED FACTOR HERE. THERE IS NO FINANCIAL
01:52PM 8 BENEFIT. AND MR. SCHENK SAYS, WELL, MAYBE THAT'S A REASON TO
01:52PM 9 DEPART FROM LIFE. AGAIN, THAT'S PUTTING THE GUIDELINES INTO AN
01:52PM 10 EXALTED PLACE THAT THEY ARE NOT DESERVING OF UNDER THE LAW, BUT
01:52PM 11 THEY ARE A REASON FOR A SIGNIFICANTLY LOWER SENTENCE HERE NOT
01:52PM 12 ONLY COMPARED TO THE GUIDELINE RANGE THAT THE COURT CALCULATED,
01:52PM 13 BUT ALSO COMPARED TO MS. HOLMES WHO DID NOT DO THAT. SHE DID
01:52PM 14 NOT INVEST HER OWN MONEY.

01:52PM 15 THE OTHER THING I'LL SAY ABOUT THAT IN TERMS OF DISPARITY,
01:52PM 16 AND I'M JUMPING AROUND BUT I HOPE IT FLOWS LOGICALLY,
01:52PM 17 YOUR HONOR, MS. HOLMES RECEIVED A VERY HARSH SENTENCE, 11 YEARS
01:52PM 18 AND 3 MONTHS. I THINK IT WAS 135 MONTHS.

01:52PM 19 AND WHAT THE GOVERNMENT ARGUED IN MS. HOLMES'S CASE, AMONG
01:52PM 20 OTHER THINGS, IS THAT YOU SHOULD SEND A MESSAGE TO THE
01:52PM 21 COMMUNITY THROUGH THE VEHICLE THAT YOU HAVE HERE, BECAUSE YOU
01:53PM 22 HAVE THE PRESS GATHERED WHO HAVE BEEN REPORTING ON THIS CASE
01:53PM 23 EXTENSIVELY FOR MANY YEARS NOW, AND YOU HAVE THIS BASIC
01:53PM 24 MOUTHPIECE TO GET THE WORD OUT IN THE COMMUNITY THAT IF YOU'RE
01:53PM 25 GOING TO COMMIT FRAUD, YOU'RE GOING TO GET A VERY HARSH

01:53PM 1 SENTENCE.

01:53PM 2 AND WHAT THE GOVERNMENT SAID IN THE CASE OF MS. HOLMES IS
01:53PM 3 THAT ORDINARILY YOU MIGHT THINK THAT IS NOT FAIR BECAUSE THE
01:53PM 4 DEFENDANT REALLY HAS NO CONTROL OVER THAT, BUT HERE THE
01:53PM 5 GOVERNMENT SAID MS. HOLMES ACTUALLY COURTED THE PRESS, AND,
01:53PM 6 THEREFORE, IT'S FAIR IN THIS CASE TO USE THAT MOUTHPIECE, IF
01:53PM 7 YOU WILL, TO GET THE WORD OUT, THE GENERAL DETERRENCE WORD.

01:53PM 8 AND THEN THEY TRIED TO PUT THIS ROUND PEG OF MR. BALWANI
01:53PM 9 INTO A ROUND HOLE OF THIS MEDIA ISSUE WHICH DOESN'T EXIST FOR
01:53PM 10 MR. BALWANI.

01:53PM 11 EVEN IF YOU THINK THAT MS. HOLMES WAS ICARUS AND FLEW TOO
01:53PM 12 CLOSE TO THE SUN, MR. BALWANI DID NOT SEEK THE SUN. HE WAS NOT
01:53PM 13 ON THE COVER OF MAGAZINES, HE DID NOT GIVE INTERVIEWS, AND HE
01:54PM 14 DID NOT GO AROUND THE COUNTRY ACCEPTING AWARDS, AND HE DID NOT
01:54PM 15 SERVE ON THE BOARD OF PRESTIGIOUS INSTITUTIONS LIKE
01:54PM 16 HARVARD UNIVERSITY. HE DIDN'T ASK FOR ANY OF THAT. ALL HE
01:54PM 17 ASKED FOR WAS A DOLLAR AND A CHANCE TO WORK HARD, AND HE IS
01:54PM 18 VERY DIFFERENT FROM MS. HOLMES.

01:54PM 19 SOME OF THE EVIDENCE THAT THE JURY FOUND WAS THE MOST
01:54PM 20 SIGNIFICANT EVIDENCE IN MS. HOLMES'S CASE, THE EVIDENCE THAT
01:54PM 21 MS. HOLMES FALSIFIED PHARMACEUTICAL REPORTS, AND SHE SAID THIS
01:54PM 22 ON THE STAND, THERE WAS REALLY NO DISPUTE ABOUT THAT, SHE SAID
01:54PM 23 THAT SHE DIDN'T THINK SHE WAS DOING ANYTHING WRONG.

01:54PM 24 BUT MR. BALWANI KNEW NOTHING ABOUT MS. HOLMES PUTTING
01:54PM 25 LOGOS ON PHARMA REPORTS THAT SHOULDN'T HAVE BEEN ON THERE OR

01:54PM 1 CHANGING WORDING IN THE REPORTS. MR. BALWANI DIDN'T DO THAT.

01:54PM 2 SO EVEN IF YOU THINK -- AND THE JURY APPARENTLY MAY HAVE
01:54PM 3 THOUGHT IN MS. HOLMES'S CASE THAT THAT'S AN ISSUE FOR
01:54PM 4 MS. HOLMES. THAT'S NOT WHAT MR. BALWANI DID. HE DIDN'T SEEK
01:54PM 5 THE MEDIA.

01:54PM 6 AND I WANT TO POINT OUT A FEW THINGS THAT MR. SCHENK
01:54PM 7 OMITTED. SO THERE'S AN ARTICLE THAT THE COURT IS VERY FAMILIAR
01:55PM 8 WITH NOW HAVING SAT THROUGH TWO TRIALS AND THAT'S THE "FORTUNE"
01:55PM 9 MAGAZINE ARTICLE AUTHORED BY ROGER PARLOFF. AND MS. HOLMES IS
01:55PM 10 ON THE COVER OF THAT "FORTUNE" ISSUE, YOU MIGHT RECALL.

01:55PM 11 THE GOVERNMENT PLAYED TAPES OF MS. HOLMES TALKING TO
01:55PM 12 ROGER PARLOFF AND MADE A CASE THAT THERE WERE FRAUDULENT
01:55PM 13 REPRESENTATIONS IN THERE.

01:55PM 14 WHAT THE GOVERNMENT DIDN'T TELL YOU IS THAT MR. BALWANI
01:55PM 15 ALSO SAT FOR A MUCH BRIEFER INTERVIEW WITH MR. PARLOFF, AND THE
01:55PM 16 GOVERNMENT DIDN'T PLAY THAT TAPE AT TRIAL. AND THE REASON IS
01:55PM 17 BECAUSE THERE'S NOTHING IN THERE WHERE MR. BALWANI MAKES ANY
01:55PM 18 MISREPRESENTATIONS TO MR. PARLOFF.

01:55PM 19 SO EVEN WHEN MR. BALWANI HAD THE OPPORTUNITY, WHICH WAS
01:55PM 20 RARE, BY THE WAY, I CAN'T EVEN THINK OF ANOTHER TIME WHEN HE
01:55PM 21 GAVE AN INTERVIEW, EVEN WHEN HE HAD THE OPPORTUNITY TO HAVE A
01:55PM 22 DIRECT VEHICLE WITH MR. PARLOFF TO SAY WHATEVER HE WANTED TO
01:55PM 23 SAY THAT THE GOVERNMENT CLAIMS HE'S GOING TO SAY FRAUDULENT
01:55PM 24 THINGS, HE DIDN'T DO IT. HE DIDN'T SAY ANYTHING FRAUDULENT,
01:56PM 25 AND THE GOVERNMENT DIDN'T PLAY THE TAPE.

01:56PM 1 SO FOR THE GOVERNMENT TO SAY THAT SOMEHOW THE MEDIA ISSUES
01:56PM 2 ARE EQUIVALENT BETWEEN THESE TWO DEFENDANTS AND THEY USE THAT
01:56PM 3 AS A REASON TO GIVE MS. HOLMES A HARSHER SENTENCE, THAT IS
01:56PM 4 ABSOLUTELY NOT APPLICABLE TO MR. BALWANI AND FOR THE SAME
01:56PM 5 REASON THAT THE GOVERNMENT ARGUED IT'S AN AGGRAVATING FACTOR IN
01:56PM 6 MS. HOLMES'S CASE, IT IS A MITIGATING FACTOR IN THIS CASE.

01:56PM 7 LET'S MOVE ON TO SOME OTHER THINGS. STILL ON THE NATURE
01:56PM 8 AND CIRCUMSTANCES OF THE OFFENSE, YOUR HONOR.

01:56PM 9 SO MR. BALWANI, THERE'S NO DISPUTE, WANTED THIS COMPANY TO
01:56PM 10 SUCCEED. MR. BOSTIC SAID THAT DURING CLOSING ARGUMENT THAT HE
01:56PM 11 WANTED THEM TO SUCCEED. AGAIN, IT'S SOMETHING THAT TAKES US
01:56PM 12 OUT OF THE HEARTLAND. THERE'S LOTS OF CASES WHERE THERE IS NO
01:56PM 13 INVESTMENT, IT'S A SCAM. THIS WAS A COMPANY THAT MR. BALWANI
01:56PM 14 WAS TRYING TO BUILD.

01:56PM 15 AND IN ORDER TO BUILD IT, HE HAD A LOT OF DATA POINTS,
01:57PM 16 RIGHT? HE KNEW THAT THE SCIENTIFIC TEAM HAD DONE HOURS AND
01:57PM 17 HOURS OF WORK TO SUBMIT AN FDA APPLICATION TO GET THEIR 4.0
01:57PM 18 DEVICE APPROVED. AND, YOU KNOW, IF YOU'RE GOING TO COMMIT A
01:57PM 19 FRAUD, WHY GO THROUGH THE EFFORTS? I MEAN, THIS WAS -- HE WAS
01:57PM 20 GETTING THE DATA AND THE COMPANY WAS WORKING ON THESE THINGS,
01:57PM 21 AND THAT THE SCIENCE WAS REAL, AND THAT IT IS GOING TO BE
01:57PM 22 SUCCESSFUL.

01:57PM 23 AND IN ORDER TO TRY TO MAKE IT AS SUCCESSFUL AS HE COULD,
01:57PM 24 HE TOOK RISKS. HE WENT TO THAILAND AND MEXICO DURING THE
01:57PM 25 HEIGHT OF THE H1N1 FLU SCARE, THAT WAS A VERY DANGEROUS DISEASE

01:57PM 1 AT THE TIME, AND HE WENT THERE SO HE COULD TRY TO GET THE
01:57PM 2 DEVICE TESTED IN HOSPITALS IN THOSE PLACES. AND EVEN LATER HE
01:57PM 3 WENT TO COLUMBIA WHERE AT THAT POINT WAS THE HOTBED OF THE ZIKA
01:57PM 4 DISEASE PANIC. HE WENT TO COLUMBIA, AND AGAIN, TRYING TO GET
01:57PM 5 THE DEVICE TESTED SO IT COULD EVENTUALLY BE USED FOR ZIKA
01:58PM 6 TESTING. HE WENT TO THOSE HOTBED AREAS BECAUSE HE WANTED THE
01:58PM 7 COMPANY TO SUCCEED. THAT'S AT PERSONAL RISK, RIGHT? AND HE
01:58PM 8 LOST A LOT HERE, YOUR HONOR, AND IT'S NOT JUST THE MONEY.

01:58PM 9 SO MR. BALWANI WAS THE SECOND IN COMMAND. I KNOW THE
01:58PM 10 COURT HAS SAID THAT, WELL, MAYBE THEY WERE COEQUALS HERE. IN
01:58PM 11 SOME WAYS THEY WERE, BUT THERE IS NO DOUBT THAT IT WAS
01:58PM 12 MS. HOLMES WHO WAS IN CHARGE, THAT SHE WAS THE CEO, THAT SHE
01:58PM 13 HAD THE POWER TO FIRE MR. BALWANI, THAT IF SHE DIDN'T LIKE WHAT
01:58PM 14 HE WAS DOING, SHE COULD HAVE FIRED HIM, SHE COULD HAVE TOLD HIM
01:58PM 15 TO DO SOMETHING DIFFERENT, SHE COULD HAVE DEMOTED HIM, ANY OF
01:58PM 16 THOSE THINGS.

01:58PM 17 AND THE GOVERNMENT HAS ARGUED REPEATEDLY JUST THAT POINT,
01:58PM 18 THAT MS. HOLMES IS THE FACE OF THE COMPANY, SHE'S THE CEO, THE
01:58PM 19 BUCK STOPPED THERE, AND THAT SHE HAD THE POWER TO FIRE
01:58PM 20 MR. BALWANI. SO NOW THAT HER SENTENCING IS OVER, THEY'RE
01:59PM 21 PERHAPS TAKING A DIFFERENT VIEW OF THE WORLD.

01:59PM 22 LET ME GO OVER A FEW POINTS THAT MR. SCHENK MADE THAT I
01:59PM 23 THINK ARE IMPORTANT TO ADDRESS, YOUR HONOR.

01:59PM 24 WE HAVE TALKED ABOUT IN OUR SENTENCING MEMO THE NATURE OF
01:59PM 25 THE SENTENCING GUIDELINES. AND AS I SAID BEFORE, I THINK THE

01:59PM 1 GOVERNMENT IS FAR TOO WEDDED, MORE THAN THE LAW ALLOWS, WEDDED
01:59PM 2 TO THE SENTENCING GUIDELINES IN THIS CASE. THE FRAUD LOSS
01:59PM 3 AMOUNT, AS WE SAID IN OUR PAPERS, THEY DON'T DISTINGUISH
01:59PM 4 BETWEEN A DEFENDANT LIKE MR. BALWANI AND A DEFENDANT WHO IS
01:59PM 5 JUST RUNNING A FICTITIOUS COMPANY THAT HAS NOTHING, NEVER HAD
01:59PM 6 ANYTHING, AND IT'S JUST A COMPLETE SCAM. THERE'S NO
01:59PM 7 DISTINGUISHING BETWEEN THOSE TYPES OF DEFENDANTS.

01:59PM 8 AND SO WHAT THE LOSS AMOUNT TABLE DOES IS ASSIGNS A
02:00PM 9 CERTAIN NUMBER TO A CERTAIN LOSS AMOUNT, AND I UNDERSTAND THE
02:00PM 10 COURT HAS MADE THOSE FINDINGS THIS MORNING OR THIS AFTERNOON.

02:00PM 11 SO EVEN THOUGH THAT'S WHAT THE GUIDELINES REQUIRE, THERE
02:00PM 12 IS SO MUCH OF A DISPARITY BETWEEN DIFFERENT DEFENDANTS IN
02:00PM 13 DIFFERENT CASES, AND I THINK THE COURT HAS TO LOOK AT THE FIRST
02:00PM 14 PERSON AS AN INDIVIDUAL AND WHAT REALLY HAPPENED, AND NOT ONLY
02:00PM 15 WHAT HAPPENED IN THE OFFENSE CONDUCT, BUT ALSO THE ENTIRE
02:00PM 16 HEALTH CARE, THE ENTIRE PERSONA, THE ENTIRE HISTORY AND MAKE A
02:00PM 17 DECISION BASED ON THAT AND NOT JUST ON THE GUIDELINES.

02:00PM 18 THE POINT I'M MAKING, YOUR HONOR, THE GUIDELINES, WE HAVE
02:00PM 19 POINTED OUT MANY SCHOLARS HAVE COMMENTED, ESPECIALLY IN A CASE
02:00PM 20 LIKE THIS, THEY CAN YIELD ABSURD RESULTS, AND WE THINK THAT
02:00PM 21 WOULD BE THE CASE HERE FOR MR. BALWANI.

02:00PM 22 THE GOVERNMENT SAYS THAT IT'S AN AGGRAVATING FACTOR THAT
02:00PM 23 MR. BALWANI HAS A SUPPORT NETWORK. I THINK THAT'S THE FIRST
02:00PM 24 TIME THAT I HAVE HEARD THAT KIND OF ARGUMENT. USUALLY THE
02:01PM 25 PRESENCE OF A SUPPORT NETWORK IS A REASON WHY THE DEFENDANT

02:01PM 1 WON'T BE A DANGER IN THE FUTURE. AND THERE REALLY ISN'T ANY
02:01PM 2 EVIDENCE THAT HE WOULD BE.

02:01PM 3 FIRST OF ALL, HE'S ALREADY IN HIS LATE 50S, AND ALL OF THE
02:01PM 4 STUDIES ARE THAT PEOPLE IN THAT AGE RANGE ARE NOT LIKELY TO
02:01PM 5 REPEAT OFFENSES. AND ALSO, WHEN YOU LOOK AT THE UNIQUE
02:01PM 6 CIRCUMSTANCES OF THIS CASE, THERE'S NO CHANCE THAT MR. BALWANI
02:01PM 7 WILL HAVE ANOTHER CRACK AT A COMPANY LIKE THERANOS. YOU KNOW,
02:01PM 8 HE'S BASICALLY AND VERY UNFORTUNATELY RADIOACTIVE AS A RESULT
02:01PM 9 OF THIS WHOLE AFFAIR.

02:01PM 10 BUT THE SUPPORT NETWORK, YOU KNOW, THE REASON HE HAS A
02:01PM 11 SUPPORT NETWORK IS BECAUSE HE'S BEEN SO GIVING OVER THE YEARS.
02:01PM 12 I MEAN, HE HAS A DEVOTED FAMILY WHO ARE HERE IN COURT TODAY,
02:01PM 13 FIVE PEOPLE. NOT EVERYONE COULD MAKE IT. SOME OF THE FAMILY
02:01PM 14 MEMBERS ARE IN INDIA, SOME ARE ON THE EAST COAST AS THE COURT
02:02PM 15 HAS HEARD BEFORE.

02:02PM 16 BUT THE REASON THAT HE HAS A LOVING FAMILY SUPPORTING HIM
02:02PM 17 AND ALL OF THESE PEOPLE WRITING LETTERS -- THE PEOPLE WHO WROTE
02:02PM 18 LETTERS ARE NOT TRYING TO EXCUSE THE CONDUCT THAT THE JURY
02:02PM 19 FOUND. THEY'RE JUST TRYING TO PRESENT TO THE COURT THE FULL
02:02PM 20 PICTURE OF MR. BALWANI AND ABOUT WHO HE IS.

02:02PM 21 AND THE REASON HE HAS THAT SUPPORT NETWORK IS BECAUSE OF
02:02PM 22 HOW CHARITABLE AND HOW SELFLESS HE'S BEEN FOR HIS ENTIRE LIFE.
02:02PM 23 AND FOR MR. SCHENK AND THE GOVERNMENT TO SAY THAT'S SOMEHOW AN
02:02PM 24 AGGRAVATING FACTOR, WELL, THAT'S JUST PUZZLING, YOUR HONOR. I
02:02PM 25 DON'T GET THAT. AND I THINK THAT'S A REASON TO LOOK AT

MR. BALWANI AS A CANDIDATE FOR LENIENCY AND NOT THE OTHER WAY AROUND.

I WANT TO ADDRESS ONE REALLY IMPORTANT THING, YOUR HONOR, AND THAT IS MR. SCHENK'S ARGUMENT THAT SOMEHOW MR. BALWANI HAS NOT ACCEPTED RESPONSIBILITY AND THAT'S ANOTHER AGGRAVATING FACTOR HE CLAIMS.

SO THERE IS A GUIDELINE ADJUSTMENT. WE HAVE NOT ARGUED FOR THAT ADJUSTMENT. THE COURT IS NOT APPLYING THE 3 POINT REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY. WE HAVE NOT ASKED FOR THAT.

MR. BALWANI EXERCISED HIS FIFTH AMENDMENT RIGHT NOT TO TESTIFY AT TRIAL. AND FOR MR. SCHENK TO SAY THAT SOMEHOW THE FACT THAT HE HASN'T ACCEPTED RESPONSIBILITY IN A CASE THAT HE WENT TO TRIAL AND EXERCISED THAT FIFTH AMENDMENT RIGHT, I BELIEVE MR. SCHENK'S POINT IS AN IMPROPER COMMENT ON MR. BALWANI'S FIFTH AMENDMENT RIGHT BECAUSE HE HAS NO OPPORTUNITY TO ACCEPT RESPONSIBILITY UNLESS HE WAIVES THAT RIGHT.

THE OTHER THING THAT MR. SCHENK SAYS ABOUT THAT IS SOMEHOW OUR ARGUMENT THAT MR. BALWANI IS BLAMING INVESTORS FOR WHAT HAPPENED AFTER HE LEFT THE COMPANY IS A REASON WHY HE'S NOT ACCEPTING RESPONSIBILITY. I WANT TO JUST CLARIFY THE RECORD ON THAT BECAUSE I THINK THAT IS A TWISTED WAY TO LOOK AT THIS.

WHAT OUR ARGUMENT IS, IS NOT THAT INVESTORS ARE TO BLAME SOMEHOW. WHAT WE HAVE SAID ABOUT THAT HAD TO DO WITH THE LOSS

02:04PM 1 CALCULATION. I DON'T WANT TO REPEAT THOSE ARGUMENTS, BUT IT'S
02:04PM 2 IMPORTANT BECAUSE MR. SCHENK MENTIONED THIS, IS THAT WHEN
02:04PM 3 MR. BALWANI LEFT THE COMPANY, THE COMPANY HAD \$350 MILLION IN
02:04PM 4 THE BANK. THAT'S NOT DISPUTED. HE ALSO HAD IP, WHICH THE
02:04PM 5 THINGS WE PUT IN THE RECORD SHOW WE BELIEVE WERE WORTH MANY,
02:04PM 6 MANY HUNDREDS OF MILLIONS OF DOLLARS, AND THE GOVERNMENT HAS A
02:04PM 7 DIFFERENT VIEW OF THAT. BUT WHATEVER YOU THINK ABOUT THAT,
02:04PM 8 MR. BALWANI AND HIS DEFENSE TEAM HAS NEVER ARGUED THAT THERANOS
02:04PM 9 WAS ENTITLED TO \$350 MILLION AND SOMEHOW YOU WOULD BE DOING
02:04PM 10 PEOPLE A FAVOR IF THEY RETURN IT TO INVESTORS. NO.

02:04PM 11 THE POINT WAS THAT WHEN MR. BALWANI LEFT THE COMPANY, THE
02:04PM 12 COMPANY DID HAVE \$350 MILLION AND HAD THE IP, AND INSTEAD OF
02:04PM 13 TRYING TO OPERATE FOR ANOTHER TWO YEARS AND MAKE A GO OF IT AS
02:04PM 14 A COMPANY, THEY COULD HAVE CLOSED THEIR DOORS RIGHT THEN AND
02:04PM 15 DISTRIBUTED WHATEVER THEY COULD DISTRIBUTE, INCLUDING THE CASH
02:04PM 16 THAT CAME FROM THE INVESTORS IN THE FIRST PLACE, DISTRIBUTED
02:04PM 17 THAT BACK TO INVESTORS, ALONG WITH WHATEVER THEY COULD GET FROM
02:05PM 18 THE IP. AND THAT ARGUMENT HAS NOTHING TO DO WITH WHETHER
02:05PM 19 MR. BALWANI ACCEPTED RESPONSIBILITY. WE HAVE NOT ASKED FOR THE
02:05PM 20 GUIDELINE ADJUSTMENT, AS I'VE SAID.

02:05PM 21 BUT FOR MR. SCHENK TO SAY WE SHOULD GIVE HIM A HARSHER
02:05PM 22 SENTENCE BECAUSE HE DIDN'T ACCEPT RESPONSIBILITY WHEN YOU PUT
02:05PM 23 ASIDE WHAT I CONSIDER UNFOUNDED ARGUMENT ABOUT THE 350 MILLION
02:05PM 24 AND THE TIME AFTER MR. BALWANI LEFT, WHEN YOU PUT THAT ASIDE,
02:05PM 25 WHICH YOU SHOULD, YOU END UP WITH WHAT I THINK IS AN IMPROPER

02:05PM 1 COMMENT ON HIS FIFTH AMENDMENT RIGHTS.

02:05PM 2 THE COURT: WELL, PARDON ME FOR INTERRUPTING AND LET
02:05PM 3 ME DO SO NOW TO TELL YOU THAT THIS COURT IS NOT GOING TO IN ITS
02:05PM 4 SENTENCE -- AND I AM GOING TO SENTENCE YOUR CLIENT. YOU KNOW
02:05PM 5 THAT. THAT'S WHY WE'RE HERE. BUT I AM NOT GOING TO SENTENCE
02:05PM 6 HIM IN ANY WAY CONSIDERING THE FACT THAT HE CHOSE TO EXERCISE
02:05PM 7 HIS UNITED STATES CONSTITUTIONAL RIGHT TO NOT TESTIFY AND
02:05PM 8 REMAIN SILENT. THAT'S A CHERISHED RIGHT THAT WE ALL ENJOY, AND
02:05PM 9 HE EXERCISED THAT RIGHT. THERE'S NO PUNITIVE ACTION ON
02:06PM 10 EXERCISING A CONSTITUTIONAL RIGHT. I DON'T TAKE MR. SCHENK'S
02:06PM 11 COMMENT THAT WAY THAT HE WAS SUGGESTING THAT.

02:06PM 12 I UNDERSTAND HOW IT COULD BE INTERPRETED THAT WAY. IT'S
02:06PM 13 NOT HOW THE COURT RECEIVED IT, AND IT'S CERTAINLY NOT HOW THE
02:06PM 14 COURT IS GOING TO EVALUATE THE APPROPRIATE SENTENCE IN THIS
02:06PM 15 CASE. YOUR CLIENT HAS THE ABSOLUTE RIGHT NOT TO TESTIFY. HE
02:06PM 16 WILL NOT BE PUNISHED FOR THE EXERCISE OF THAT.

02:06PM 17 YOU'RE COMPLETELY CORRECT THE GUIDELINES DO PROVIDE UNDER
02:06PM 18 3E1(A) AND (B) THE OPPORTUNITY, SHOULD A DEFENDANT CHOOSE TO
02:06PM 19 EXERCISE THAT OPPORTUNITY, TO RECEIVE A 3 LEVEL REDUCTION
02:06PM 20 SHOULD THEY WISH TO DO SO AND IF THEY OTHERWISE QUALIFY, AND HE
02:06PM 21 CHOSE NOT TO DO THAT.

02:06PM 22 SO TO YOUR POINT, HE IS NOT ENTITLED TO THE GUIDELINE
02:06PM 23 REDUCTION. BUT I AM NOT GOING TO EVEN CONSIDER THE FACT THAT
02:06PM 24 HE DID NOT TESTIFY NOR THAT HE -- I THINK IT WAS IN -- I CAN'T
02:07PM 25 REMEMBER WHAT PARAGRAPH IT WAS IN THE PSR, BUT MS. GOLDSBERRY

02:07PM 1 NOTES THAT HE DID NOT MAKE ANY STATEMENT AS FAR AS ACCEPTANCE
02:07PM 2 OF RESPONSIBILITY, AND FOR PURPOSES OF HER REPORT CALCULATING
02:07PM 3 THE GUIDELINE CALCULATIONS THAT WAS AN IMPORTANT INQUIRY, BUT
02:07PM 4 FOR THAT REASON ONLY.

02:07PM 5 MR. COOPERSMITH: YOUR HONOR, I REALLY APPRECIATE
02:07PM 6 THE COURT'S COMMENTS, AND I'M, OF COURSE, NOT SURPRISED, BUT
02:07PM 7 ALSO GLAD TO HEAR IT.

02:07PM 8 AND THE POINT I'M MAKING IS NOT THAT I THOUGHT THE COURT
02:07PM 9 WOULD PUNISH MR. BALWANI FOR THAT, AND, OF COURSE, THE COURT
02:07PM 10 WOULDN'T DO THAT AND SHOULDN'T. IT'S JUST THAT MR. SCHENK'S
02:07PM 11 ARGUMENT NEEDS TO BE THROWN OUT BECAUSE THE IDEA THAT HE'S NOT
02:07PM 12 ACCEPTING RESPONSIBILITY, THAT'S A REASON TO IMPOSE MORE PRISON
02:07PM 13 TIME, THAT JUST I DON'T THINK FLIES.

02:07PM 14 BUT LET ME MOVE ON, YOUR HONOR.

02:07PM 15 MR. SCHENK MENTIONED, YOU KNOW, CERTAIN HARMS THAT WERE
02:07PM 16 CAUSED, RIGHT? SO ONE THING HE COMMENTED ON WAS THE INVESTOR
02:08PM 17 HARM. AND IF YOU BELIEVE THERE IS INVESTOR LOSS, AND I
02:08PM 18 UNDERSTAND THE COURT SO FOUND, THEN THAT IS A HARM IN THE CASE.

02:08PM 19 BUT BASICALLY THIS IS A DOUBLE COUNTING OR MAYBE IT'S
02:08PM 20 QUADRUPLE COUNTING OR QUINTUPLE COUNTING. THE IDEA IS THAT THE
02:08PM 21 GUIDELINE MR. SCHENK IS TRYING TO TAKE ADVANTAGE OF ALREADY
02:08PM 22 ACCOUNT FOR A VERY LENGTHY SENTENCE JUST FROM THAT ONE FACTOR
02:08PM 23 UNDER 3553(A) FACTORS OF THE GUIDELINES WOULD DICTATE A CERTAIN
02:08PM 24 GUIDELINE RANGE, WHICH IS OBVIOUSLY ADVISORY.

02:08PM 25 BUT MR. SCHENK WANTS TO THEN DOUBLE COUNT THAT ARGUMENT

02:08PM 1 AGAIN IN ARGUING FOR A SENTENCE EVEN ABOVE THE GUIDELINE RANGE
02:08PM 2 THE COURT CALCULATED.

02:08PM 3 AND THEN PATIENT HARM. THE COURT ALREADY, AND WE
02:08PM 4 APPRECIATE, DID NOT FIND THE FACTOR OF MR. BALWANI CONSCIOUSLY
02:08PM 5 OR RECKLESSLY CAUSING PATIENT HARM. ALL OF US MAKE ERRORS
02:09PM 6 OBVIOUSLY. WE POINTED TO THE EXAMPLE IN THE BRIEF, THE
02:09PM 7 CLEVELAND CLINIC EXAMPLE. THIS IS ALL PUBLIC, THAT THE
02:09PM 8 CLEVELAND CLINIC WAS FOUND TO BE IN IMMEDIATE JEOPARDY BY THE
02:09PM 9 CMS LABORATORY REGULATORS ON MANY SCORES, AND IN FACT SOME OF
02:09PM 10 THE SAME THINGS THAT THERANOS WAS FOUND FOR, AND THEY HAD TO
02:09PM 11 CORRECT THE PROBLEMS, AND NO ONE WAS PROSECUTED.

02:09PM 12 BUT I BRING THAT UP BECAUSE WE'RE NOT IN THAT CASE, BUT
02:09PM 13 ALL LABS MAKE ERRORS. IN FACT, DR. BURNS ON THE STAND SAID,
02:09PM 14 WELL, HE HAD SOME PROBLEMS WITH OTHERS LABS.

02:09PM 15 SO THAT'S WHAT HAPPENED. SO BY DEFINITION ANY LABORATORY
02:09PM 16 CASE, WHETHER IT'S CRIMINAL OR CIVIL OR REGULATORY, IS GOING TO
02:09PM 17 INVOLVE SOME ERROR THAT A LAB MADE, AND, OF COURSE, THERE'S
02:09PM 18 ALWAYS THAT HARM.

02:09PM 19 SO MR. BALWANI NEVER WANTED THAT. THERE'S NO EVIDENCE, AS
02:09PM 20 WE'VE SAID BEFORE AND I WON'T REPEAT THOSE ARGUMENTS, BUT NEVER
02:09PM 21 WANTED ANYONE TO BE HARMED. HE WOULDN'T HARM A FLY.

02:09PM 22 INSTEAD, WHAT MR. BALWANI HAS DEMONSTRATED HIS ENTIRE LIFE
02:10PM 23 WAS THAT HE WANTS TO GIVE. HE'S GRATEFUL TO BE HERE, HE'S
02:10PM 24 GRATEFUL TO BE A UNITED STATES CITIZEN, HE'S GRATEFUL TO HAVE
02:10PM 25 HAD THE OPPORTUNITY TO GIVE TO HIS COMMUNITY. HE'S DONE THAT

02:10PM 1 OVER AND OVER AGAIN. HE'S DEMONSTRATED HIS CHARACTER.

02:10PM 2 OBVIOUSLY HE WAS CONVICTED BY A JURY OF FRAUD AND THE
02:10PM 3 COURT HAS TO SENTENCE HIM OF COURSE, AND THAT'S WHY WE'RE HERE,
02:10PM 4 BUT HE IS DESERVING OF A LENIENT SENTENCE. HE'S NOT
02:10PM 5 MS. HOLMES. HE DID NOT PURSUE THE SAME PATH AS SHE DID. HE
02:10PM 6 DID NOT PURSUE FAME AND FORTUNE AND RECOGNITION AND GLORY. HE
02:10PM 7 DID NOT SELL A SINGLE SHARE. HE DID NOT TRY TO PROFIT. HE DID
02:10PM 8 NOT TRY TO HARM ANYBODY, AND, YES, THE COURT HAS TO SENTENCE
02:10PM 9 HIM, BUT NOT TO THE RANGE THAT THE GOVERNMENT IS RECOMMENDING
02:10PM 10 OR PROBATION IS RECOMMENDING, OR MS. HOLMES RECEIVED BY THIS
02:10PM 11 COURT.

02:10PM 12 NOT ALL DEFENDANTS ARE THE SAME. IT'S AN INDIVIDUALIZED
02:10PM 13 DETERMINATION.

02:10PM 14 AND WITH THAT, YOUR HONOR, THANK YOU.

02:10PM 15 THE COURT: THANK YOU.

02:10PM 16 AND I INTERRUPTED YOUR PRESENTATION WITH MY COMMENTS, AND
02:10PM 17 I DIDN'T MEAN TO SUGGEST IN ANY WAY THAT YOU SHOULD IN ANY WAY
02:11PM 18 RETREAT FROM ANY COMMENTS. SO IF YOU HAVE ANYTHING YOU DIDN'T
02:11PM 19 GET A CHANCE TO SAY BECAUSE OF MY INTERRUPTION, YOU CERTAINLY
02:11PM 20 SHOULD GO FORWARD NOW. I WANT YOU TO GIVE YOUR FULSOME
02:11PM 21 RESPONSE TO BOTH THE GOVERNMENT'S AND YOUR FULSOME POSITION.
02:11PM 22 SO I RARELY INTERRUPT SOMEONE DURING THEIR PRESENTATION. I DID
02:11PM 23 SO BECAUSE I WANTED YOU TO KNOW THE COURT'S FEELINGS ABOUT YOUR
02:11PM 24 CLIENT'S EXERCISE OF HIS RIGHTS, BUT I DIDN'T MEAN TO INTERRUPT
02:11PM 25 YOU.

02:11PM 1 SO IF YOU HAD SOMETHING ELSE YOU WANTED TO SAY, REVIEW
02:11PM 2 YOUR NOTES AND LET ME KNOW, PLEASE.

02:11PM 3 MR. COOPERSMITH: YEAH, I MIGHT TAKE A MOMENT TO
02:11PM 4 CONFER WITH MY TEAM, YOUR HONOR.

02:11PM 5 THE COURT: SURE. GO RIGHT AHEAD.

02:11PM 6 MR. COOPERSMITH: AND I MIGHT AS WELL BE THOROUGH
02:11PM 7 WHILE WE'RE HERE.

02:11PM 8 THE COURT: ABSOLUTELY.

02:12PM 9 (DISCUSSION OFF THE RECORD.)

02:12PM 10 MR. COOPERSMITH: THANK YOU FOR THE COURT'S
02:12PM 11 INDULGENCE. I APPRECIATE IT.

02:12PM 12 THE COURT: OF COURSE.

02:12PM 13 MR. COOPERSMITH: A FEW OTHER THINGS I'M REMINDED I
02:12PM 14 SHOULD SAY FOR COMPLETENESS, AND I THINK THESE THINGS ARE
02:12PM 15 IMPORTANT.

02:12PM 16 FIRST OF ALL, ONE THING THE GOVERNMENT SAID, I WROTE IN MY
02:12PM 17 NOTES AND I THINK IT IS WORTH RESPONDING TO, AND THAT IS THEY
02:12PM 18 SAY MR. BALWANI WAS THE QUOTE, "DE FACTO LAB DIRECTOR" AFTER
02:12PM 19 DR. ROSENDORFF LEFT. I DON'T THINK THERE'S ANY BASIS FOR THAT.
02:12PM 20 MR. BALWANI WAS NOT THE DE FACTO LAB DIRECTOR.

02:12PM 21 THERE WERE, FIRST OF ALL, AS I SAID BEFORE, AN ENTIRE
02:12PM 22 SCIENTIFIC TEAM AT THERANOS, INCLUDING DR. SAKSENA WHO WERE
02:12PM 23 INVOLVED IN THE LAB. EVEN IF DR. DHAWAN AND DR. SAWYER WERE
02:13PM 24 NOT AS INVOLVED AS YOU MIGHT LIKE, THERE WAS A WHOLE TEAM OF
02:13PM 25 SCIENTISTS WHO WERE THERE, AND THEY WERE THERE TO MAKE SURE THE

02:13PM 1 LAB RESULTS WERE AS GOOD AS THEY COULD BE AND THEY WERE RUNNING
02:13PM 2 SMOOTHLY.

02:13PM 3 AT THE SAME TIME, AS I SAID BEFORE, THE COMPANY WAS
02:13PM 4 PHASING OUT THE EDISON DEVICES AND USING MORE COMMERCIAL
02:13PM 5 DEVICES. IN FACT, THEY OPENED UP THIS LAB IN ARIZONA, AND
02:13PM 6 DR. YOUNG WAS PUT IN CHARGE OF THE LAB, NOT MR. BALWANI, AND
02:13PM 7 DR. YOUNG WAS QUALIFIED AS A LAB DIRECTOR.

02:13PM 8 THE IDEA THAT HE WAS ALL OF THE SUDDEN TAKING IT UPON
02:13PM 9 HIMSELF TO OVERSEE WHAT RESULTS WERE BEING RELEASED TO
02:13PM 10 PATIENTS, THAT'S JUST NOT THE CASE. THERE IS NOT A SINGLE TIME
02:13PM 11 THAT MR. BALWANI SIGNED OFF ON RELEASING A RESULT TO A PATIENT.
02:13PM 12 THAT JUST DIDN'T HAPPEN, AND HE'S NOT THE DE FACTO LAB
02:13PM 13 DIRECTOR. HE WAS OPERATIONALLY INVOLVED IN THE LAB AS THE
02:13PM 14 COURT KNOWS.

02:13PM 15 IN ADDITION, JUST A WORD ABOUT STIFLING DISSENT I THINK IS
02:14PM 16 HOW THE GOVERNMENT PUT IT. AND, YOU KNOW, THE COURT HEARD FROM
02:14PM 17 ERIKA CHEUNG, AND SHE GOT TO THERANOS AS A YOUNG GRADUATE OF
02:14PM 18 THE UNIVERSITY OF CALIFORNIA AND WAS EXCITED TO WORK THERE, AND
02:14PM 19 THEN SHE RAISED SOME ISSUES.

02:14PM 20 WELL, MR. BALWANI, THE GOVERNMENT WOULD HAVE YOU BELIEVE,
02:14PM 21 YOUR HONOR, THAT SHE RAISED ISSUES AND MR. BALWANI TOLD HER, I
02:14PM 22 DON'T WANT TO HEAR IT, JUST DO YOUR JOB, RUN THE SAMPLES, DON'T
02:14PM 23 TALK TO ME.

02:14PM 24 THAT IS NOT AT ALL WHAT HAPPENED. WHEN IT GOT TO THE
02:14PM 25 POINT OF MR. BALWANI, ACCORDING TO MS. CHEUNG, SAYING YOUR JOB

02:14PM 1 IS TO RUN SAMPLES, BY THAT TIME THERE HAD BEEN SCIENTIST AFTER
02:14PM 2 SCIENTIST, ESPECIALLY DR. YOUNG, WHO LOOKED AT HER CLAIMS AND
02:14PM 3 LOOKED AT WHAT SHE SAID ABOUT QC AND LOOKED AT WHAT SHE SAID
02:14PM 4 ABOUT PROFICIENCY TESTS.

02:14PM 5 THE COURT MIGHT REMEMBER THERE WAS AN EXHIBIT, AND I DON'T
02:15PM 6 HAVE THE NUMBER, BUT THE COURT PROBABLY REMEMBERS IT WAS A
02:15PM 7 TABLE OF NUMBERS SHOWING A COMPARISON BETWEEN THERANOS DEVICES
02:15PM 8 AND MODIFIED PREDICATE -- I'M SORRY, ACTUAL PREDICATE MACHINES,
02:15PM 9 FDA MACHINES, AND SOME OF THE NUMBERS ACCORDING TO THE
02:15PM 10 GOVERNMENT WERE A LITTLE OFF.

02:15PM 11 DR. ROSENDORFF TESTIFIED THAT THAT WAS NOT A PROPER
02:15PM 12 EXPERIMENT, IT DIDN'T SHOW A FAILURE. DR. PANDORI PUT TOGETHER
02:15PM 13 A WHOLE POWERPOINT ABOUT HOW THIS ALTERNATIVE ASSESSMENT
02:15PM 14 PROCEDURE WAS THE RIGHT WAY TO GO AND THAT WAS NOT THE CORRECT
02:15PM 15 WAY TO ANALYZE THINGS.

02:15PM 16 SO BY THE TIME THAT MR. BALWANI ALLEGEDLY HAD A
02:15PM 17 CONVERSATION WITH MS. CHEUNG WHERE SHE CLAIMED HE SAID JUST DO
02:15PM 18 YOUR JOB, AND HE ALREADY HAD SCIENTISTS LOOK AT THIS, INCLUDING
02:15PM 19 DR. YOUNG, ON EVERY SINGLE CLAIM. SO THIS WAS THE OPPOSITE OF
02:15PM 20 A MANAGER NOT WANTING TO HEAR FROM MS. CHEUNG. HE SPENT A LOT
02:15PM 21 OF TIME, A LOT OF COMPANY TIME, A LOT OF HIS EMPLOYEE'S TIME
02:15PM 22 TRYING TO UNDERSTAND WHERE SHE WAS COMING FROM AND TO ADDRESS
02:15PM 23 THE CONCERNS AS BEST AS HE COULD.

02:15PM 24 SO THAT IDEA OF SHUTTING PEOPLE DOWN I THINK IS -- THERE'S
02:16PM 25 A SORT OF MYTH THAT'S DEVELOPED ABOUT MR. BALWANI. I THINK IF

02:16PM 1 YOU READ THE MEDIA, HE'S SOME KIND OF ENFORCER. IF YOU READ
02:16PM 2 THE LETTERS FROM EMPLOYEES, THAT'S NOT HOW HE WAS PERCEIVED, AT
02:16PM 3 LEAST NOT BY EVERYBODY. AND THIS IDEA THAT HE'S SHUTTING
02:16PM 4 MS. CHEUNG DOWN IS JUST NOT CONSISTENT WITH THE FACTS.

02:16PM 5 THE OTHER THING I WANTED TO SAY, AND WE PUT THIS IN OUR
02:16PM 6 SENTENCING PAPERS AND I MENTIONED THIS BEFORE, HE DID IN FACT
02:16PM 7 HAVE HIS FAMILY TESTED AT THERANOS. AND IT WAS NOT JUST HIS
02:16PM 8 MOM, IT WAS HIS SIBLINGS AND OTHERS. WHY WOULD YOU DO THAT IF
02:16PM 9 YOU THOUGHT THAT THE LAB WAS SO BAD? I'M NOT SAYING THAT TO
02:16PM 10 ARGUE IT AGAINST THE JURY'S VERDICT, BECAUSE WE'RE HERE BECAUSE
02:16PM 11 OF A JURY VERDICT. BUT IT SHOWS YOU THAT NOT EVERYTHING THAT
02:16PM 12 THE GOVERNMENT SAYS ABOUT MR. BALWANI AND NOT EVERYTHING THEY
02:16PM 13 SHOWED AT TRIAL IS NECESSARILY TRUE. AND THERE'S NO BETTER
02:16PM 14 TIME TO THINK ABOUT IT OF HOW MR. BALWANI WANTED THE COMPANY TO
02:16PM 15 BE AND WHY HE HAD CONFIDENCE IN THE LAB. HE WAS NOT TRYING TO
02:17PM 16 CREATE PATIENT HARM. THERE'S NO BETTER EVIDENCE HERE REALLY
02:17PM 17 THAN THE FACT THAT HE HAS HIS OWN FAMILY TESTED THERE. NOBODY
02:17PM 18 WOULD DO THAT. HE'S BELOVED BY HIS FAMILY, AND HE LOVES THEM,
02:17PM 19 AND IT JUST DOESN'T WORK THAT WAY.

02:17PM 20 SO, AGAIN, I'M NOT TRYING TO SAY THAT WE SHOULD IGNORE THE
02:17PM 21 VERDICT. WE CAN'T DO THAT. BUT I THINK IT IS A MITIGATING
02:17PM 22 FACTOR THAT THE COURT SHOULD CONSIDER.

02:17PM 23 SO THANK YOU FOR THE EXTRA TIME, YOUR HONOR. I APPRECIATE
02:17PM 24 IT.

02:17PM 25 THE COURT: OF COURSE.

02:17PM 1 MR. COOPERSMITH: I'M SURE WITH A COMPLICATED CASE
02:17PM 2 LIKE THIS I COULD GO ON FOR HOURS OR DAYS AS I DID DURING
02:17PM 3 CLOSING ARGUMENT, BUT I DO WANT THE COURT TO TAKE THESE THINGS
02:17PM 4 INTO CONSIDERATION. OBVIOUSLY, WE'VE SUBMITTED A LOT OF
02:17PM 5 MATERIAL THAT THE COURT HAS READ, AND WE DO THINK THAT
02:17PM 6 MR. BALWANI IS DESERVING OF LENIENCY, AND THAT'S WHAT WE ASK
02:17PM 7 THE COURT TO DO.

02:17PM 8 THE COURT: THANK YOU.

02:17PM 9 ANYTHING FURTHER FROM THE GOVERNMENT?

02:17PM 10 MR. SCHENK: NO. THANK YOU, YOUR HONOR.

02:17PM 11 THE COURT: PROBATION, ANYTHING FURTHER?

02:17PM 12 PROBATION OFFICER: NO, YOUR HONOR.

02:17PM 13 THE COURT: ALL RIGHT. THANK YOU.

02:17PM 14 IN JUST A MOMENT I'M GOING TO CALL UPON MR. BALWANI TO ASK
02:18PM 15 IF HE WISHES TO BE HEARD, BUT I'LL TAKE A MOMENT OF PERSONAL
02:18PM 16 PRIVILEGE, IF I MAY, AND I SHOULD HAVE DONE THIS AT THE OUTSET
02:18PM 17 TO THANK ALL COUNSEL, THANK YOU. WE WERE TOGETHER FOR A LONG
02:18PM 18 TIME IN THIS TRIAL. IT WAS HARD FOUGHT ON BOTH SIDES. IT WAS
02:18PM 19 MY GREAT PRIVILEGE TO WORK WITH ALL OF YOU, AND I APPRECIATE
02:18PM 20 THAT.

02:18PM 21 AS MR. COOPERSMITH POINTS OUT, THE JURY HAS SPOKEN. THE
02:18PM 22 REASON WE'RE HERE TODAY IS FOR THE SENTENCING. YOU ALL KNOW
02:18PM 23 THAT SENTENCING IS THE MOST DIFFICULT THING THAT YOU DO AS
02:18PM 24 LITIGATORS. IT'S CERTAINLY THE MOST DIFFICULT THING THAT A
02:18PM 25 JUDGE DOES WHEN SHE IMPOSES A SENTENCE ON AN INDIVIDUAL.

02:18PM 1 BUT, AGAIN, I JUST WANTED TO THANK YOU ALL FOR YOUR
02:18PM 2 COURTESY THROUGHOUT THE TRIAL.

02:18PM 3 MR. BALWANI, SIR, YOU HAVE THE RIGHT TO BE HEARD AT YOUR
02:18PM 4 SENTENCING.

02:18PM 5 IS THERE ANYTHING YOU WOULD LIKE TO SAY OR ANYTHING YOU
02:18PM 6 WOULD LIKE ME TO KNOW BEFORE I IMPOSE SENTENCE?

02:18PM 7 MR. COOPERSMITH: YOUR HONOR, I WOULD JUST TELL THE
02:18PM 8 COURT THAT MR. BALWANI APPRECIATES THE INVITATION TO SPEAK, AND
02:19PM 9 WE KNOW HE HAS THAT RIGHT. HE ALSO HAS THE RIGHT NOT TO SPEAK,
02:19PM 10 AND HE CHOOSES TO EXERCISE HIS RIGHT NOT TO SPEAK.

02:19PM 11 THE COURT: OKAY. IS THAT CORRECT, MR. BALWANI?

02:19PM 12 THE DEFENDANT: YES, YOUR HONOR.

02:19PM 13 THE COURT: ALL RIGHT. THANK YOU VERY MUCH, SIR.
02:19PM 14 THANK YOU.

02:19PM 15 ALL RIGHT. ANYTHING FURTHER FROM EITHER SIDE?

02:19PM 16 MR. SCHENK: NO, YOUR HONOR.

02:19PM 17 MR. COOPERSMITH: NO, YOUR HONOR.

02:19PM 18 PROBATION OFFICER: NO, YOUR HONOR.

02:19PM 19 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. AND
02:19PM 20 THANK YOU, COUNSEL, FOR THE TIME SPENT THIS MORNING. THIS WAS
02:19PM 21 HELPFUL TO THE COURT.

02:19PM 22 WE SPENT A LOT OF TIME GOING THROUGH THE NUANCES ABOUT THE
02:19PM 23 PRELIMINARY INFORMATION THAT MUST BE RESOLVED PRIOR TO THE
02:19PM 24 IMPOSITION OF A SENTENCE, AND AS I SAID, WE ALL KNOW WHY WE'RE
02:19PM 25 HERE. I'VE READ THE PSR. LET ME SAY I HAVE READ THE LETTERS

02:19PM 1 AND THE DOCUMENTS THAT HAVE BEEN SUPPLIED TO THE COURT, THE
02:19PM 2 INFORMATION BOTH FROM THE GOVERNMENT AND THEIR EXPERTS, THEIR
02:19PM 3 SENTENCING MEMORANDUM, AS WELL AS THE SENTENCING MEMORANDUM
02:19PM 4 FROM THE DEFENDANT.

02:19PM 5 I'VE READ THE LETTERS THAT WERE PRESENTED TO THE COURT
02:20PM 6 THAT SPEAK IN SUPPORT OF MR. BALWANI AND SPEAK TO HIS
02:20PM 7 BACKGROUND. THEY SPEAK TO THE NATURE OF THEIR RELATIONSHIP
02:20PM 8 WITH HIM, THEIR KNOWLEDGE OF HIM.

02:20PM 9 THERE WERE PHOTOGRAPHS, WEREN'T THERE, THAT SHOW MANY PUSH
02:20PM 10 CARTS FROM PAKISTAN, I BELIEVE, AND INDIA THAT SHOW THE WORK OF
02:20PM 11 THE CONTRIBUTIONS THAT MR. BALWANI HAS MADE AND THE EFFORTS
02:20PM 12 THAT INDIVIDUALS WHO HAVE CHANGED THEIR LIVES, THEY'VE BEEN
02:20PM 13 ABLE TO ESTABLISH BUSINESSES WITH PUSH CARTS, SELLING FRUITS,
02:20PM 14 SELLING BEVERAGES, AND OTHER MATTERS TO IMPROVE THEIR LIVES.

02:20PM 15 SO TO MR. COOPERSMITH'S POINT, THESE ARE THINGS THAT AN
02:20PM 16 INDIVIDUAL LOOKS AT, AND THEY HAVE A GREAT IMPRESSION, POSITIVE
02:20PM 17 IMPRESSION ON THE COURT AS DO THE FAMILY SUPPORT, THE MANY
02:21PM 18 LETTERS THAT SPOKE ABOUT THEIR RELATIONSHIP WITH MR. BALWANI
02:21PM 19 AND THEIR SPECIAL CONNECTION WITH HIM, NOT JUST A BLOOD
02:21PM 20 RELATIONSHIP BUT MORE.

02:21PM 21 I BELIEVE HIS BROTHERS ARE IN COURT, AND THEY ARE GRATEFUL
02:21PM 22 TO HIM BECAUSE HE PAID FOR THEIR COLLEGE TUITION, HE PAID FOR
02:21PM 23 THE TUITION THAT ALLOWED THEM TO GO TO COLLEGE, AND PERHAPS
02:21PM 24 WHAT I HAVE LEARNED FROM HIM IN THE PSR WAS THAT HE WAS THE SON
02:21PM 25 WHO WAS SENT FORWARD TO ACCOMPLISH MUCH AND TO RETURN MUCH TO

02:21PM 1 HIS FAMILY. HE DID THAT WITH HIS FAMILY. HE CONSISTENTLY
02:21PM 2 SUPPORTED HIS FAMILY.

02:21PM 3 WE'RE TOLD ABOUT THE CHARITABLE GIFTS THAT HE MADE AND
02:21PM 4 SOME OF THOSE WERE BEFORE HIS INVOLVEMENT WITH THE COMPANY.
02:21PM 5 MANY OF THEM WERE AFTER HIS INVOLVEMENT WITH THE COMPANY AND
02:21PM 6 CONTINUED INTO THE 2020, I THINK, WAS ONE DATE THAT I NOTED
02:22PM 7 WHERE HE CONTINUED TO SUPPORT BOTH HIS -- THE TEMPLE THAT HE
02:22PM 8 WORSHIPS AT. I THINK THAT'S WHERE THE -- I BELIEVE THAT'S
02:22PM 9 WHERE THE WELL WAS IN MILPITAS, CALIFORNIA, TO ASSIST THE
02:22PM 10 TEMPLE THERE IF I'M NOT MISTAKEN AND THAT'S MY RECOLLECTION.

02:22PM 11 BUT THAT SHOWS ANOTHER SIDE OF HIM, AND I THINK THAT WAS
02:22PM 12 YOUR POINT, MR. COOPERSMITH.

02:22PM 13 AND TO YOUR POINT, MR. COOPERSMITH, SENTENCING IS ALWAYS
02:22PM 14 INDIVIDUALIZED.

02:22PM 15 THE COURT NEEDS TO LOOK AT -- WE'VE TALKED ABOUT
02:22PM 16 MS. HOLMES. SHE'S PART OF THIS CASE, BUT SHE'S NOT PART OF
02:22PM 17 THIS SENTENCE. THE SENTENCE THAT THE COURT MUST CONSIDER IN
02:22PM 18 THIS CASE IS INDIVIDUALIZED TO MR. BALWANI, AND THAT'S WHAT THE
02:22PM 19 COURT INTENDS TO DO AND TALKING A LITTLE BIT ABOUT THE THINGS
02:22PM 20 THAT I'VE LEARNED ABOUT HIM FROM THE PSR AND THAT HE SHARED
02:22PM 21 WITH THE PROBATION OFFICER.

02:22PM 22 BUT WE KNOW THAT THE JURY SAT THROUGH THIS TRIAL FOR
02:23PM 23 MONTHS, THEY HEARD THE VARIOUS WITNESSES, THEY HEARD THE
02:23PM 24 ARGUMENTS OF COUNSEL, THEY HEARD THE CLOSING ARGUMENTS, THEY
02:23PM 25 HEARD THE EVIDENCE, AND THEY LOOKED AT THE EVIDENCE VERY

02:23PM 1 CAREFULLY. THERE WERE MANY, MANY EXHIBITS THAT WERE PRESENTED.

02:23PM 2 AS I'VE SAID PREVIOUSLY, A JURY THAT WAS SELECTED BY BOTH
02:23PM 3 SIDES IS A REPRESENTATIVE OF THE COMMUNITY, AND WE ASKED THIS
02:23PM 4 JURY TO COME IN AS THE COMMUNITY TO HEAR AND JUDGE AND TEST THE
02:23PM 5 EVIDENCE THAT THE GOVERNMENT PUTS FORWARD THROUGH AN INDICTMENT
02:23PM 6 AND IN THAT WAY TO RENDER THE COMMUNITY'S DECISION AS TO
02:23PM 7 WHETHER OR NOT THERE HAVE BEEN VIOLATIONS THAT THE GOVERNMENT
02:23PM 8 HAS PROVED BY PROOF BEYOND A REASONABLE DOUBT.

02:23PM 9 IN THIS CASE THIS JURY DID RETURN VERDICTS OF GUILT AS TO
02:23PM 10 EACH OF THE COUNTS THAT WERE ALLEGED IN THE INDICTMENT, AND
02:24PM 11 THAT BRINGS US TO THIS DATE TODAY.

02:24PM 12 THE OTHER THINGS THAT I LEARNED ABOUT MR. BALWANI WERE HIS
02:24PM 13 GREAT SUCCESS IN EDUCATION AND THEN FOLLOWING HIS EDUCATION
02:24PM 14 WHAT HE DID WITH THAT EDUCATION, HE WENT FORWARD. HE WAS A
02:24PM 15 SUCCESS IN BUSINESS. HE WORKED AT MICROSOFT FOR A WHILE, BUT
02:24PM 16 THEN HE LEFT AND HE STARTED HIS OWN BUSINESS, AND AS WE KNOW IN
02:24PM 17 SILICON VALLEY HERE, IT IS NOT UNUSUAL, IT'S QUITE THE NORM FOR
02:24PM 18 SOMEONE TO START A BUSINESS, A STARTUP. THAT'S A PHRASE THAT
02:24PM 19 WE ALL KNOW ABOUT. AND WE KNOW WHAT HAPPENS WITH THOSE
02:24PM 20 STARTUPS. OFTENTIMES THE PEOPLE WHO BEGIN THOSE COMPANIES,
02:24PM 21 THEY LOOK FORWARD TO BEING ACQUIRED AND THE ACQUISITION IS
02:24PM 22 SOMETHING THAT PEOPLE SEEK, AND THAT'S CERTAINLY WHAT HAPPENED
02:24PM 23 WITH MR. BALWANI.

02:24PM 24 THE INVESTIGATION IN THE PROBATION REPORT REFLECTS THAT HE
02:25PM 25 HAD STARTED A BUSINESS, AND THAT HE SOLD THE BUSINESS AT GREAT

02:25PM 1 PROFIT TO HIMSELF. THAT'S SOMETHING THAT IS VERY COMMON IN
02:25PM 2 THIS VALLEY. AND I WAS GOING TO SAY IT'S INTERESTING, OR
02:25PM 3 PERHAPS TRAGIC IS A BETTER WORD, TO LOOK AT THE PATH OF THIS
02:25PM 4 CASE AND TO REALIZE THAT THAT PATH HAS COME FULL CIRCLE.
02:25PM 5 INSTEAD OF IN A LARGE BUILDING, AN OFFICE BUILDING, A CAMPUS
02:25PM 6 WITH R&D AND LABS AND THINGS AND ENGINEERS, WHAT HAS HAPPENED
02:25PM 7 NOW IS ALL OF THAT HAS COME BACK TO A COURTROOM BECAUSE OF THE
02:25PM 8 JURY'S FINDINGS, BECAUSE OF THE INDICTMENT THAT THE COMMUNITY,
02:25PM 9 AT THE GUIDANCE OF THE GOVERNMENT, THE COMMUNITY ALSO WAS
02:25PM 10 RESPONSIBLE FOR THE INDICTMENT AND THE COMMUNITY HEARD THE
02:26PM 11 TRIAL, AND WE COME BACK TO THIS.

02:26PM 12 IS THAT WHAT WAS HAPPENING HERE?

02:26PM 13 MR. COOPERSMITH, YOU SUGGEST THAT THIS WAS A GREAT IDEA,
02:26PM 14 AND YOUR CLIENT WAS ALL IN ON IT. THIS WAS TECHNOLOGY THAT
02:26PM 15 COULD CHANGE THE WORLD, IT COULD CHANGE THE WAY THAT HEALTH
02:26PM 16 CARE IS DISTRIBUTED AND ADMINISTERED, AND YOUR CLIENT HAS SAID
02:26PM 17 HE WAS ALL IN. HE TRAVELLED. THAT WASN'T BEFORE THE JURY. I
02:26PM 18 THINK THIS IS SOMETHING THAT THE PROBATION DEPARTMENT GLEANED
02:26PM 19 FROM HIM. THE JURY CERTAINLY DIDN'T HEAR ANY OF THAT, BUT HIS
02:26PM 20 TRAVEL WAS TO PERHAPS MARKET THE DEVICE AND PROVIDE THAT DEVICE
02:26PM 21 FOR OTHER COUNTRIES, POOR COUNTRIES.

02:26PM 22 BUT, AGAIN, WE COME FULL CIRCLE. HOW DID THAT HAPPEN?
02:26PM 23 WHAT WAS THE DISRUPTION BETWEEN THIS GENIUS IDEA AND WHAT WAS
02:26PM 24 IT THAT DISRUPTED THAT MACHINE, THAT TECHNOLOGY, THAT BENEFIT
02:27PM 25 TO SO MANY COUNTRIES? AND WHAT THE JURY FOUND WAS THAT IT WAS

02:27PM 1 FRAUD, IT WAS WIRE FRAUD. AND FOR SOME REASON THAT HAPPENED.
02:27PM 2 WE DON'T KNOW WHAT IT WAS. THE JURY HEARD THE EVIDENCE. I
02:27PM 3 SUPPOSE THE JURY HEARD THE EVIDENCE, AND THEY FOUND THAT THE
02:27PM 4 CONDUCT WAS FRAUDULENT.

02:27PM 5 WHAT I'M SUGGESTING IS WHY DID THAT HAVE TO HAPPEN? AND
02:27PM 6 THIS WAS A SUCCESSFUL BUSINESS. THE IDEA WAS STRONG. THERE
02:27PM 7 WERE MANY INVESTORS GOING, AND THEN THERE WERE PROBLEMS, AS
02:27PM 8 THERE ARE IN EVERYTHING IN LIFE.

02:27PM 9 AND IN THIS NEW VENTURE PROBLEMS STARTED TO ARISE. THERE
02:28PM 10 WAS A LOT OF, I THINK IT WAS CALLED -- WHAT WAS IT CALLED? IT
02:28PM 11 WAS GHOST OPERATION FOR TEN YEARS AND UNTIL THE MACHINE AND
02:28PM 12 EVERYTHING DEVELOPED. MR. BALWANI CAME INTO THE COMPANY IN
02:28PM 13 2009 AND THEN THINGS STARTED TO GO FORWARD, BUT THEN THERE WERE
02:28PM 14 PROBLEMS.

02:28PM 15 AND NOTWITHSTANDING THOSE PROBLEMS, THE DEFENDANTS CHOSE
02:28PM 16 TO GO FORWARD AND CONTINUE WITH DECEPTION I'LL CALL IT,
02:28PM 17 MISLEADING INFORMATION, ACTIVE, MISLEADING AND CONTINUING TO
02:28PM 18 PERPETUATE THE FRAUD EVEN WHEN THEY KNEW THAT THE EVIDENCE
02:28PM 19 INTERNALLY INFORMED THEM THAT THEY COULD NOT PRODUCE WHAT THEY
02:28PM 20 SAID THEY WERE GOING TO PRODUCE TO THEIR INVESTORS. AND THAT'S
02:28PM 21 THE WIRE FRAUD, ISN'T IT? THAT'S THE FRAUD ON THE INVESTORS.

02:28PM 22 THEY KNEW THERE WERE ISSUES. THEY CONCEALED, THEY MISLED
02:29PM 23 INVESTORS, THEY MISLED PATIENTS. THEY CHOSE TO, FOR SOME
02:29PM 24 REASON, TO IGNORE ALL OF THAT EVIDENCE AND TO GO FORWARD WITH
02:29PM 25 THE INVESTMENTS. THAT'S THE DISRUPTION. THAT'S THE

02:29PM 1 SUPERSEDING INTERVENING ACTS THAT PREVENTED THERANOS FROM GOING
02:29PM 2 FORWARD WITH THIS TECHNOLOGY THAT HAD SUCH GREAT PROMISE.

02:29PM 3 WE WONDER WHY, WHY DID THAT HAPPEN? WHAT WAS IT? WAS IT
02:29PM 4 GREED? MR. COOPERSMITH SUGGESTS IT WASN'T BECAUSE HE,
02:29PM 5 MR. BALWANI, WAS A SHAREHOLDER, AND HE LOST MILLIONS OF DOLLARS
02:29PM 6 IN THIS EVENT.

02:29PM 7 AND MR. SCHENK SAYS, WELL, IT'S A LITTLE DIFFERENT BECAUSE
02:29PM 8 HE'S A STAKEHOLDER, AND THERE WAS SOME HOPE THAT THE COMPANY
02:29PM 9 WOULD, NOTWITHSTANDING THE FRAUD, COME TO FRUITION AND HE WOULD
02:29PM 10 BE QUITE WEALTHY.

02:30PM 11 SOMEONE SAID, I THINK ONE OF THE LETTERS AND SOMEBODY SAID
02:30PM 12 THAT, WELL, INVESTORS SHOULD ONLY INVEST WHAT THEY EXPECT TO
02:30PM 13 LOSE. IS THAT WHAT HE DID? IS THAT MONEY THAT HE DID NOT HAVE
02:30PM 14 WORRIES ABOUT OR WAS NOT CONCERNED ABOUT PARTING COMPANY WITH?
02:30PM 15 WE DON'T KNOW. I DON'T KNOW, AND I'M NOT SUGGESTING THAT THERE
02:30PM 16 WAS ANYTHING ON HIS PART, HIS CHOOSING NOT TO TESTIFY THAT
02:30PM 17 SHOULD SUGGEST ANYTHING OTHERWISE, AND I'M NOT SUGGESTING IN
02:30PM 18 ANY WAY THAT THERE'S A DEARTH OF EVIDENCE BECAUSE OF THAT AT
02:30PM 19 ALL.

02:30PM 20 BUT I THINK IT'S JUST THAT ENDURING QUESTION ABOUT WHY DID
02:30PM 21 SUCH A PROMISING COMPANY COME TO THIS END AND WHY DID
02:30PM 22 MR. BALWANI FIND HIMSELF IN THIS?

02:30PM 23 AND THE EVIDENCE SHOWED THAT HE KNEW ABOUT THE FRAUD.
02:30PM 24 THERE WERE TEXT MESSAGES BETWEEN HE AND HIS CODEFENDANT, THERE
02:30PM 25 WERE CONDUCT THAT WAS ENGAGED IN DIRECTLY BY MR. BALWANI WITH

INVESTORS WHEN HE MET WITH THEM, HE PROVIDED FINANCIAL PROJECTIONS THAT WERE NOT JUST UNREALISTIC, THEY WERE LIES, THEY WERE FRAUD.

AND WAS IT THE NECESSITY TO KEEP THE FINANCES GOING, TO KEEP THE COMPANY GOING JUST ONE MORE, JUST ONE MORE BLOCK, JUST ONE MORE BLOCK, WE'RE ALMOST THERE? IS THAT WHAT IT WAS?

WERE THOSE ACTS OF DESPERATION OR ACTS OF MANIPULATION? THAT CONDUCT IS CONCURRENT WITH THE FRAUD ON THE INVESTORS, AND REGRETTABLY WHAT THE JURY IN THIS CASE FOUND AND WHAT THEY SAW WAS MANIPULATION AND A TRUE FLIGHT FROM HONEST BUSINESS PRACTICES.

AND, OF COURSE, IN HINDSIGHT WHAT WE WOULD RECOGNIZE IS THE SOLUTION SHOULD HAVE BEEN AN INITIATION OF AN ACQUAINTANCE WITH AND A FULSOME RELATIONSHIP WITH HONESTY, TRUTH, AND CANDOR. FOR SOME REASON THAT WAS NOT ENGAGED HERE, AND PERHAPS THAT'S WHY WE ARE AT THIS REGRETTABLE STATE TODAY WHERE MR. BALWANI STANDS BEFORE THE COURT HAVING BEEN CONVICTED OF ALL OF THE COUNTS, INCLUDING THE PATIENT COUNTS IN THIS MATTER, AND THAT IS TROUBLING.

I CERTAINLY RESPECT AND I DO NOTE ALL OF THE GOOD WORKS THAT MR. BALWANI HAS DONE IN HIS LIFE WITH HIS FAMILY AND OTHERS.

THE COURT IS NOT GOING TO IGNORE THOSE FACTORS, AND THEY'RE IMPORTANT FACTORS THAT THE COURT CONSIDERS IN ITS 3553 ANALYSIS AS THE COURT MUST DO.

02:32PM 1 IN THIS MATTER, AGAIN, RECOGNIZING THAT THE INDIVIDUAL
02:32PM 2 BEFORE THE COURT AND HIS HISTORY, THE CHARACTERISTICS,
02:33PM 3 INCLUDING HIS CHARITY AND RECOGNIZING ALL OF THE GOOD THINGS
02:33PM 4 THAT HE HAS DONE, THE COURT IS GOING TO IMPOSE A SENTENCE IN
02:33PM 5 THIS MATTER. THE COURT, FIRST OF ALL, WILL ORDER A SPECIAL
02:33PM 6 ASSESSMENT OF \$1200. THAT'S \$100 PER COUNT IN THIS MATTER.

02:33PM 7 AS TO RESTITUTION, COUNSEL, I AM NOT GOING TO ORDER
02:33PM 8 RESTITUTION TODAY. I'M GOING TO DEFER THAT FOR ANOTHER DATE,
02:33PM 9 AND I'LL ASK COUNSEL TO MEET AND CONFER ABOUT A SCHEDULE FOR A
02:33PM 10 RESTITUTION HEARING.

02:33PM 11 I'D ALSO INVITE YOU TO CONFER WITH THE CODEFENDANT'S
02:33PM 12 COUNSEL HERE, TOO, TO SEE IF THAT IS A HEARING THAT YOU WOULD
02:33PM 13 LIKE TO ENGAGE IN JOINTLY.

02:33PM 14 AS YOU MIGHT KNOW, I CONTINUED -- I DID NOT MAKE A
02:33PM 15 RESTITUTION FINDING IN MS. HOLMES'S CASES. I ASKED COUNSEL TO
02:33PM 16 MEET AND CONFER ABOUT A SCHEDULE FOR THAT. I WOULD INVITE YOU
02:34PM 17 ALL TO TALK ABOUT WHETHER OR NOT IT MAKES SENSE TO HAVE ONE
02:34PM 18 RESTITUTION HEARING OR IF YOU WOULD LIKE TO HAVE TWO SEPARATE
02:34PM 19 RESTITUTION HEARINGS OR JUST THE PROTOCOLS FOR THAT, AND THEN
02:34PM 20 YOU CAN CONTACT MS. ROBINSON ABOUT THAT.

02:34PM 21 SO I AM DEFERRING RESTITUTION AT THIS TIME,
02:34PM 22 MS. GOLDSBERRY.

02:34PM 23 IN THIS MATTER THE COURT WILL IMPOSE A FINE OF \$25,000 AS
02:34PM 24 TO COUNTS ONE THROUGH TWELVE. THAT'S CONCURRENT AS TO EACH
02:34PM 25 COUNT, MS. GOLDSBERRY.

02:34PM 1 I AM NOT GOING TO IMPOSE A SENTENCE OF PROBATION IN THIS
02:34PM 2 MATTER. THE COURT IS GOING TO FIND THAT THERE'S A SUPERVISED
02:34PM 3 RELEASE TERM OF THREE YEARS AS TO EACH COUNT, AND THOSE SHALL
02:34PM 4 RUN CONCURRENT, CONCURRENT TO ONE ANOTHER.

02:34PM 5 IN THIS MATTER, RECOGNIZING THAT MR. BALWANI WAS CONVICTED
02:34PM 6 OF ALL OF THE COUNTS IN THIS MATTER, AND AGAIN, CONSIDERING THE
02:35PM 7 HISTORY AND CHARACTERISTICS, INCLUDING HIS CHARITY AND GOOD
02:35PM 8 WORKS AND RECOGNIZING ALL OF THAT, THE COURT IS GOING TO IMPOSE
02:35PM 9 A SENTENCE, A GUIDELINE SENTENCE, AND THE COURT FINDS IT'S
02:35PM 10 APPROPRIATE TO IMPOSE A GUIDELINE SENTENCE. THE COURT WILL
02:35PM 11 IMPOSE A GUIDELINE SENTENCE OF 155 MONTHS, AND IN IMPOSING THIS
02:35PM 12 SENTENCE THE COURT FINDS THAT IT IS SUFFICIENT BUT NOT GREATER
02:35PM 13 THAN NECESSARY TO COMPLY WITH THE PURPOSES OF 18 UNITED STATES
02:35PM 14 CODE SECTION 3553.

02:35PM 15 THE COURT HAS CONSIDERED THE HISTORY AND THE
02:35PM 16 CHARACTERISTICS OF THE DEFENDANT, THE NATURE AND CIRCUMSTANCES
02:35PM 17 OF THE OFFENSE, INCLUDING THE NEED FOR THE SENTENCE IMPOSED TO
02:35PM 18 REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR
02:35PM 19 THE LAW, TO PROVIDE JUST PUNISHMENT FOR THE OFFENSE, TO AFFORD
02:35PM 20 ADEQUATE DETERRENCE IN CRIMINAL CONDUCT AND ALSO TO AVOID
02:35PM 21 DISPARITY IN SENTENCES OF CO-DEFENDANTS.

02:36PM 22 THE COURT IMPOSES THIS SENTENCE AFTER CONSULTING THE
02:36PM 23 UNITED STATES SENTENCING GUIDELINES AND IN LIGHT OF THE
02:36PM 24 STATUTORY CONCERNS EXPRESSED IN 18 UNITED STATES CODE 3553(A) .

02:36PM 25 MR. BALWANI, SIR, YOU HAVE THE RIGHT TO FILE AN APPEAL.

02:36PM 1 ANY APPEAL MUST BE FILED WITHIN 14 DAYS.

02:36PM 2 DO YOU UNDERSTAND THAT, SIR?

02:36PM 3 THE DEFENDANT: I DO, YOUR HONOR.

02:36PM 4 THE COURT: THANK YOU.

02:36PM 5 AS TO A SURRENDER DATE. MR. COOPERSMITH, I WAS GOING TO
02:36PM 6 SUGGEST A SURRENDER DATE SOME TIME IN MARCH, AND I WAS GOING TO
02:36PM 7 IDENTIFY MARCH, EITHER -- LET'S SEE, THE 15TH, NO LATER THAN
02:36PM 8 2:00 P.M., MARCH 15TH, 2023, NO LATER THAN 2:00 P.M. I DIDN'T
02:36PM 9 ASK THE GOVERNMENT IF THEY WANTED TO BE HEARD ON THE SURRENDER
02:36PM 10 DATE. PARDON ME.

02:36PM 11 MR. SCHENK: NOTHING FURTHER. THANK YOU.

02:36PM 12 THE COURT: ALL RIGHT. THANK YOU.

02:36PM 13 DID YOU HAVE A DESIRE TO ASK THE COURT TO MAKE A
02:37PM 14 RECOMMENDATION TO THE BUREAU OF PRISON AS TO A LOCATION?

02:37PM 15 MR. COOPERSMITH: YES, YOUR HONOR. WE'VE DONE THE
02:37PM 16 LOOKING AT THE VARIOUS FACTORS. WE WOULD ASK THE COURT TO
02:37PM 17 RECOMMEND THE MINIMUM SECURITY SATELLITE CAMP AT LOMPOC.

02:37PM 18 THE COURT: ALL RIGHT.

02:37PM 19 MR. COOPERSMITH: AND WE HAVE PARTICULAR LANGUAGE WE
02:37PM 20 WOULD LIKE THE COURT TO CONSIDER USING IN THE JUDGMENT, AND I
02:37PM 21 CAN CITE THAT NOW.

02:37PM 22 THE COURT: LET ME SAY THAT I WAS GOING TO RECOGNIZE
02:37PM 23 THAT THIS WAS A NONVIOLENT OFFENSE, AND THAT MR. BALWANI
02:37PM 24 PRESENTS NO HISTORY OF VIOLENCE. HE HAS NO RECORD, CRIMINAL
02:37PM 25 RECORD. HE'S NOT -- THERE'S NO RECORD OF ANY SUBSTANCE ABUSE

02:37PM 1 NOR IS THERE ANY RECORD OF VIOLENCE IN HIS BACKGROUND SUCH THAT
02:37PM 2 A RECOMMENDATION TO A MINIMUM SECURITY CAMP LIKE FACILITY WOULD
02:38PM 3 BE APPROPRIATE, AND THE COURT WOULD RECOMMEND TO THE BUREAU OF
02:38PM 4 PRISONS THAT IT LOCATE HIM AT A FACILITY SUCH AS THAT THAT IS
02:38PM 5 CLOSEST AS POSSIBLE TO ALAMEDA COUNTY OR THE SOUTHERN PART OF
02:38PM 6 SANTA CLARA COUNTY TO AFFORD FOR FAMILY VISITATION BECAUSE THE
02:38PM 7 COURT FINDS THAT FAMILY VISITATION ENHANCES REHABILITATION.
02:38PM 8 THAT'S WHAT I WAS GOING TO STATE.

02:38PM 9 DO YOU WANT TO AUGMENT THAT?

02:38PM 10 MR. COOPERSMITH: YES, YOUR HONOR.

02:38PM 11 AND THE CAMP FACILITY THAT WE'RE AWARE OF THAT WOULD FIT
02:38PM 12 THE DESCRIPTION THE COURT JUST GAVE WOULD BE THE SATELLITE CAMP
02:38PM 13 AT ATWATER, BUT WE ARE ASKING THE COURT TO RECOMMEND ASSIGNMENT
02:38PM 14 OF MR. BALWANI TO THE MINIMUM SECURITY CAMP AT LOMPOC, AND THE
02:38PM 15 REASON IS THAT IT IS A LITTLE FURTHER AWAY. I THINK IT'S A
02:38PM 16 FOUR HOUR DRIVE INSTEAD OF A TWO HOUR DRIVE FROM HIS CURRENT
02:38PM 17 RESIDENCE, BUT NONETHELESS, IT'S A FACILITY THAT HAS MUCH MORE
02:38PM 18 PROGRAMMING AND I THINK IS MORE SUITABLE FOR MR. BALWANI, AND
02:39PM 19 HOPEFULLY HE CAN BE PRODUCTIVE IF THAT'S WHERE HE ENDS UP.

02:39PM 20 THE COURT: OKAY.

02:39PM 21 MR. COOPERSMITH: SO WE WOULD LIKE THE COURT TO
02:39PM 22 RECOMMEND THE MINIMUM SECURITY CAMP AT LOMPOC, AND THE COURT
02:39PM 23 HAS ALREADY MADE THE FINDING THAT HIS SECURITY NEEDS DON'T
02:39PM 24 REFLECT THE NEED TO BE CONFINED ABOVE THE CAMP LEVEL, AND I
02:39PM 25 UNDERSTAND THAT'S WHAT THE COURT HAS SAID; IS THAT CORRECT?

02:39PM 1 THE COURT: YES, YES. THE ONE THING I DIDN'T,
02:39PM 2 THERE'S ALSO NO EVIDENCE OF ANY GANG ACTIVITY THAT THE BUREAU
02:39PM 3 OF PRISONS NEEDS TO BE CONCERNED ABOUT.

02:39PM 4 MR. COOPERSMITH: OKAY. SO THAT'S OUR
02:39PM 5 RECOMMENDATION, YOUR HONOR.

02:39PM 6 THE COURT: OKAY. THANK YOU. I WOULD RECOMMEND IF
02:39PM 7 THE LOMPOC CAMP IS AVAILABLE, AFTER THEY EVALUATE MR. BALWANI,
02:39PM 8 I HAVE NO OBJECTION TO THAT BEING HIS SITE.

02:39PM 9 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

02:39PM 10 IN PARTICULAR, IT'S THE SATELLITE CAMP BECAUSE THERE'S
02:39PM 11 ACTUALLY ANOTHER HIGHER SECURITY LEVEL PRISON THERE AS WELL.
02:39PM 12 SO IT'S THE SATELLITE CAMP.

02:40PM 13 THE COURT: IT'S THE MINIMUM SECURITY SATELLITE
02:40PM 14 CAMP.

02:40PM 15 MR. COOPERSMITH: CORRECT, YOUR HONOR.

02:40PM 16 THE COURT: RIGHT. OKAY. ANYTHING FURTHER?

02:40PM 17 MR. SCHENK: NO, YOUR HONOR. THANK YOU.

02:40PM 18 THE COURT: MR. COOPERSMITH, ANYTHING FURTHER?

02:40PM 19 MR. COOPERSMITH: I'M JUST LOOKING AT MY NOTES.
02:40PM 20 NO, YOUR HONOR, NOTHING FURTHER.

02:40PM 21 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK
02:40PM 22 YOU.

02:40PM 23 THANK YOU, COUNSEL.

02:40PM 24 (COURT CONCLUDED AT 2:40 P.M.)
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: DECEMBER 12, 2022

EXHIBIT B

To

Declaration of Jeffrey B. Coopersmith

EXCHANGE AND RELEASE AGREEMENT

This **EXCHANGE AND RELEASE AGREEMENT** (this “**Agreement**”), is made and entered into as of May 15, 2017, by and among **THERANOS, INC.**, a Delaware corporation (the “**Company**”), those certain holders of the Company’s Series C-1 Preferred Stock (“**Series C-1 Preferred**”) and Series C-2 Preferred Stock (“**Series C-2 Preferred**”) who are parties hereto (each a “**Holder**” and, collectively, the “**Holders**”), and Elizabeth Holmes.

RECITALS

A. Prior to the date hereof, the Company issued and sold in a series of transactions its Series C-1 Preferred and Series C-2 Preferred to certain of the Holders (such transactions, the “**Preferred Stock Financings**”).

B. The Board of Directors of the Company (the “**Board**”) has determined that it is in the best interests of the Company and its stockholders to provide an opportunity for (i) existing holders of the Series C-1 Preferred who purchased Series C-1 Preferred for \$3.00 per share (the “**First Series C-1 Preferred**,” and such Holders, the “**First C-1 Holders**”) to exchange such shares of Series C-1 Preferred into an equivalent number of shares of newly-created Series C-1A Preferred Stock (the “**Series C-1A Preferred**”), (ii) existing holders of the Series C-1 Preferred who purchased Series C-1 Preferred for \$15.00 per share (the “**Second Series C-1 Preferred**,” and such Holders, the “**Second C-1 Holders**”) to exchange such shares of Series C-1 Preferred into an equivalent number of shares of newly-created Series C-1B Preferred Stock (the “**Series C-1B Preferred**”) and (iii) existing holders of the Series C-2 Preferred (the “**C-2 Holders**”) to exchange such shares of Series C-2 Preferred into an equivalent number of shares of newly-created Series C-2A Preferred Stock (the “**Series C-2A Preferred**,” and together with the exchange of the First Series C-1 Preferred and the Second Series C-1 Preferred, the “**Exchange**”), in each case in consideration for a release of claims against the Company.

C. Each of the undersigned First C-1 Holders desires to exchange each share of First Series C-1 Preferred held by such First C-1 Holder for one share of Series C-1A Preferred, in accordance with the terms and conditions of this Agreement.

D. Each of the undersigned Second C-1 Holders desires to exchange each share of Second Series C-1 Preferred held by such Second C-1 Holder for one share of Series C-1B Preferred, in accordance with the terms and conditions of this Agreement.

E. Each of the undersigned C-2 Holders desires to exchange each share of Series C-2 Preferred held by such C-2 Holder (and together with any exchanged shares of First Series C-1 Preferred and Second Series C-1 Preferred, the “**Exchanged Shares**”) for one share of Series C-2A Preferred (and together with any shares of Series C-1A Preferred and Series C-1B Preferred, the “**Adjusted Shares**”), in accordance with the terms and conditions of this Agreement.

AGREEMENT

In consideration of the foregoing premises and the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Company, each Holder and Elizabeth Holmes agree as follows:

1. Exchange of Shares.

1.1. Prior to the Closing (defined below), the Company shall have adopted and filed with the Secretary of State of the State of Delaware the Amended and Restated Certificate of Incorporation of the Company in the form of Exhibit A attached to this Agreement (the “**Restated Certificate**”).

1.2. The Company has commenced an exchange offer to each holder of First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred, in compliance with all applicable laws and regulations, offering such holders of First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred the right to participate in the Exchange on the same terms and conditions as those contained in this Agreement, provided that (a) such exchange offer shall close no earlier than twenty (20) business days after commencement thereof (the “**Completion Date**”); and (b) each holder of First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred that elects to participate in the Exchange shall become a party to this Agreement as a Holder. The Exchange is conditioned upon a minimum of 66 2/3% of the outstanding shares of the Second Series C-1 Preferred and the Series C-2 Preferred (together as a single class) (the “**Minimum Holders**”) electing to participate. If the Minimum Holders do not participate, the Exchange will not be consummated.

1.3. On the date that is no later than two (2) business days after the Completion Date, the closing of the Exchange (the “**Closing**”) shall take place whereby each of the Holders will transfer the Exchanged Shares held by such Holder by delivery of the original stock certificates underlying such Exchanged Shares or by executing a form of stock power transferring such Exchanged Shares, and the Company shall issue to each such Holder the Adjusted Shares. Immediately following the Closing, the Exchanged Shares will be cancelled by the Company and shall not be re-issued. This Agreement shall become effective at 5:00 p.m. Pacific Daylight Time on the date on which the Closing occurs (the “**Effective Time**”). At the Effective Time, each of the undersigned Holders who previously held Exchanged Shares shall then hold Adjusted Shares, in accordance with the terms and conditions of this Agreement. If the Closing does not take place within sixty (60) days after the date of this Agreement, this Agreement, including the provisions set forth in Section 2 of this Agreement (the “**Release**”), shall automatically terminate and be of no further force and effect. At any time prior to the Effective Time, the Company may, in its discretion, rescind the offer to complete the Exchange.

1.4. For United States federal (and applicable state and local) income tax purposes the parties intend that the transactions contemplated by this Agreement be treated as an adjustment to the purchase price paid by the Holders for the First Series C-1 Preferred, Second Series C-1 Preferred, and Series C-2 Preferred, as applicable, and that the transactions not be treated as a taxable event with respect to the Company or any Holder. Without limiting the foregoing, the parties intend that neither the Exchange nor the adjustment to the applicable Conversion Rate (as defined in the Restated Certificate) applicable to a Holder be treated as a distribution for purposes of Section 305 of the Internal Revenue Code of 1986, as amended (the “**Code**”). The Company shall file (or cause to be filed) all tax returns (including information returns, supplements or other tax filing obligations) in accordance with this Section 1.4 and shall take (or cause to be taken) no position contrary thereto or inconsistent therewith on any tax return or in the course of any audit, litigation or otherwise or make or file any statement or declaration inconsistent therewith unless otherwise required pursuant to a final determination within the meaning of Section 1313 of the Code.

1.5. As soon as practicable following the Closing, the Company shall deliver to each Holder participating in the Exchange a certificate or book-entry security entitlement representing the Adjusted Shares being issued to such Holder upon receipt from such Holder of the certificate

representing such Holder's Exchanged Shares (or an affidavit of lost certificate acceptable to the Company) for cancellation. The Company hereby acknowledges, covenants and agrees that in no event shall it issue any Adjusted Shares other than pursuant to this Agreement or in connection with another exchange transaction where holders of First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred are permitted to exchange such shares for Series C-1A Preferred, Series C-1B Preferred, or Series C-2A Preferred, as applicable, subject to the provisions of Section 5 of this Agreement.

1.6. At or prior to the Closing, each of the Company and the Holders shall take such actions and execute such additional documents, certificates and instruments and take such other steps as shall be required to consummate the Exchange expeditiously, and shall take such actions following the Closing as may be required in connection with the agreements and covenants contained herein.

2. Release of Claims.

2.1. Contingent upon and effective as of the Effective Time, each Holder on behalf of itself and its direct or indirect affiliates, agents, trustees, beneficiaries, directors, officers, subsidiaries, estates, successors, assigns, members and partners (collectively, "**Releasors**"), solely in their capacity as a stockholder of the Company, hereby fully, finally, and forever waives, releases, relinquishes, and discharges the Company and (a) its current and former officers and employees, and each of its and their affiliates, contractors, consultants, auditors, accountants, financial advisors, professional advisors, attorneys, investment bankers, representatives, insurers, trustees, trustors, agents, professionals, spouses, immediate family members, predecessors, successors, assigns, heirs, executors, or administrators, (b) its current and former directors, and each of their affiliates, contractors, consultants, auditors, accountants, financial advisors, professional advisors, attorneys, investment bankers, representatives, insurers, trustees, trustors, agents, professionals, spouses, immediate family members, predecessors, successors, assigns, heirs, executors, or administrators, (c) other stockholders (and any of their affiliates) who execute this Agreement, and (d) their respective successors and assigns, (individually, a "**Releasee**" and collectively, "**Releasees**") from any and all claims, demands, losses, rights, obligations, debts, liabilities, and causes of action of any nature whatsoever, whether known or unknown, suspected or unsuspected, direct or derivative, and that have been or could in the future be asserted in any forum, whether foreign or domestic, whether arising under federal, state, common, or foreign law or in equity, which Releasors now have or have ever had or may hereafter have directly or indirectly against any Releasee arising out of, based on, or relating in any way to any transaction with the Company or to their capacity as a stockholder of the Company that has occurred up until and including the date hereof, including, without limitation, any claim, demand, cause of action, obligation, debt and liability arising out of or relating to (i) the ownership of the shares purchased in the Preferred Stock Financings or in connection with the holding, acquisition, or disposition of any securities of the Company, (ii) any purchase agreement and related disclosures associated with the Preferred Stock Financings or the holding, acquisition, or disposition of any securities of the Company, including any agreement based upon or incorporating the Company's representations, warranties and disclosures as set forth in such purchase agreement, as well as any representations, omissions, acts, or facts that have been made by the Company or any of the Releasees up until and including the date hereof, (iii) any alleged violation by the Releasees of any federal, state, local or foreign regulation, rule, or statute regulating securities, including, without limitation, any alleged violation of the Securities Act of 1933, as amended, and the rules and regulations thereunder and any alleged violation of the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder, and any alleged claim of fraud, fraudulent inducement, negligent misrepresentation, or breach of contract, that arises out of or is related to the Preferred Stock Financings or in connection with the holding, acquisition, or disposition of any securities of the Company, (iv) any breach of fiduciary duty, (v) any actions of, or failures to take an action by, the Board and any committee of the Board in connection with the sale of any shares of the capital stock of the Company, (vi) any claim related to (A) the Company's compliance with applicable healthcare regulatory

laws (B) the Preferred Stock Financings, or (C) the holding, acquisition, or disposition of any securities of the Company, and (vii) any other claim arising out of or related in any manner to the Preferred Stock Financings or in connection with the holding, acquisition, or disposition of any securities of the Company (each a “**Holder’s Released Claim**” and, collectively, the “**Holders’ Released Claims**”). For the avoidance of doubt, nothing contained herein shall release any Releasee from any and all claims, demands, causes of action, obligations, debts and liabilities arising out of or relating to any actions taken by the Releasees that occur after the Effective Time.

2.2. Release of Unknown Claims. Each of the Holders hereby waives the benefits of Section 1542 of the California Civil Code (and any comparable law applicable in another jurisdiction), which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Each of the Holders may hereafter discover facts in addition to or different from those which he, she or it now knows or believes to be true with respect to the subject matter of the Holders’ Released Claims or the Releasees, but each Holder expressly, fully, finally and forever settles and releases any and all Holders’ Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed, or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Each Holder acknowledges that such additional or different facts could materially affect the claims that are being released and the desirability of entering this Agreement. Each Holder further acknowledges that this release of unknown claims was separately bargained for and was a material element of this Agreement.

2.3. Covenant Not to Assert Claim. Each of the Holders hereby irrevocably covenants to refrain from, directly or indirectly, asserting any claim or demand, or commencing, instituting or causing to be commenced, any suit or proceeding of any kind against any Releasee, based upon any matter purported to be released hereby.

2.4. No Liability. Nothing herein shall be construed as an admission of liability by any party.

2.5. Final Release. Each party agrees that the releases and discharges contained in this Agreement are given for good and adequate consideration, freely and voluntarily. Each party has had the right to consult with counsel of its choosing in connection with this Agreement and has had ample opportunity to do so. If a party has not consulted with counsel in connection herewith, such party has knowingly and willingly elected not to do so. Each Holder agrees that this Agreement represents a full and final release and discharge of all of the Holders’ Released Claims. Each Holder represents and warrants that, other than the Holders’ Released Claims, such Holder does not have actual knowledge of any claims, demands, causes of action, obligations, debts or liabilities whatsoever, whether at law or in equity, of such Holder against the Company as of the date hereof.

3. Representations and Warranties of the Holders. Each Holder hereby represents and warrants to the Company, severally and not jointly, that:

3.1. Authorization. The Holder has full power and authority to enter into this Agreement and when executed and delivered by the Holder, this Agreement will constitute valid and legally binding obligations of the Holder, enforceable in accordance with their terms, except (a) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and any other laws of general application affecting enforcement of creditors' rights generally, and (b) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies.

3.2. Purchase for Own Account. The Holder represents that it acquired the Exchanged Shares and is acquiring the Adjusted Shares solely for its own account and beneficial interest for investment and not for sale or with a view to distribution of the Adjusted Shares or any part thereof, has no present intention of selling (in connection with a distribution or otherwise), granting any participation in, or otherwise distributing the same, and does not presently have reason to anticipate a change in such intention. By executing this Agreement, the Holder further represents that the Holder does not presently have any contract, undertaking, agreement or arrangement with any person to sell, transfer or grant participations to such person or to any third person, with respect to any of the Adjusted Shares.

3.3. Information and Sophistication. The Holder hereby: (a) acknowledges that it has received all the information it has requested that it considers necessary or appropriate for deciding whether to exchange its Exchanged Shares for the Adjusted Shares, (b) represents that it has had an opportunity to ask questions and receive answers regarding the terms and conditions of the Exchange and to obtain any additional information necessary to verify the accuracy of the information given to such Holder and (c) further represents that it has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risk of this transaction and its investment in the Adjusted Shares.

3.4. Non-Reliance. The Holder (a) disclaims the existence of and reliance upon any representation or warranty, express or implied, by the Company and/or the Company's Related Parties (as defined below), except as expressly set forth herein, regarding any aspect of this Agreement, the Exchange, the operation or financial condition of the Company, the viability or approvability of its technologies, the commercialization of its technologies, the value of the Company's stock or any other matter relevant to such Holder's determination to enter into this Agreement and to participate in the Exchange, (b) represents that it is not relying upon the Company or any of the Company's Related Parties, or any representation or warranty (or the completeness or accuracy thereof) of the Company or its Related Parties except as set forth herein, in making its decision to exchange shares pursuant to this Agreement, and (c) acknowledges that the Company is relying upon the truth of the representations and warranties in this Section 3.4 in connection with this Agreement. For purposes of this Agreement, "**Related Parties**" shall mean current and former directors, officers, partners, employees, attorneys, agents, successors, assigns, current and former stockholders (including current and former limited partners, general partners and management companies), owners, representatives, predecessors, parents, affiliates, associates and subsidiaries.

3.5. Ability to Bear Economic Risk. The Holder acknowledges that investment in the Adjusted Shares involves a high degree of risk, and represents that it is able, without materially impairing its financial condition, to hold the Adjusted Shares for an indefinite period of time and to suffer a complete loss of its investment.

3.6. Further Limitations on Disposition. Without in any way limiting or affecting the representations set forth above or any other agreements that exist between the Company and any

Holder, the Holder further agrees not to make any disposition of all or any portion of the Adjusted Shares unless and until:

(a) there is then in effect a registration statement under the U.S. Securities Act of 1933, as amended (the “*Act*”), covering such proposed disposition and such disposition is made in accordance with such registration statement; or

(b) the Holder shall have notified the Company of the proposed disposition and, if reasonably requested by the Company, such Holder shall have furnished the Company with an opinion of counsel, reasonably satisfactory to the Company, that such disposition will not require registration under the Act or any applicable state securities laws, provided that no such opinion shall be required for dispositions in compliance with Rule 144, except in unusual circumstances.

Notwithstanding the provisions of subsections (a) and (b) above, and without limiting or affecting any agreements that exist between the Company and any Holder, no such registration statement or opinion of counsel shall be necessary for a transfer by such Holder to a partner (or retired partner) or member (or retired member) of such Holder in accordance with partnership or limited liability company interests, or transfers by gift, will or intestate succession to any spouse or lineal descendants or ancestors, if all transferees agree in writing to be subject to the terms hereof to the same extent as if they were a Holder hereunder.

3.7. Accredited Investor Status. Holder is an “accredited investor” as such term is defined in Rule 501 under the Act.

3.8. Restricted Securities. The Holder understands that the Adjusted Shares have not been, and will not be, registered under the Act, by reason of a specific exemption from the registration provisions of the Act which depends upon, among other things, the bona fide nature of the investment intent and the accuracy of the Holder’s representations as expressed herein. The Holder understands that the Adjusted Shares are “restricted securities” under applicable U.S. federal and state securities laws and that, pursuant to these laws, the Holder must hold the Adjusted Shares indefinitely unless they are registered with the Securities and Exchange Commission and qualified by state authorities, or an exemption from such registration and qualification requirements is available. The Holder acknowledges that the Company has no obligation to register or qualify the Adjusted Shares for resale except as set forth in that certain Amended and Restated Investors’ Rights Agreement, dated as of an even date herewith. The Holder further acknowledges that if an exemption from registration or qualification is available, it may be conditioned on various requirements including, but not limited to, the time and manner of sale, the holding period for the Adjusted Shares, and on requirements relating to the Company which are outside of the Holder’s control, and which the Company is under no obligation and may not be able to satisfy.

3.9. No Public Market. The Holder understands that no public market now exists for any of the securities issued by the Company, and that the Company has made no assurances that a public market will ever exist for the Adjusted Shares.

3.10. Legends. The Holder understands that the Adjusted Shares, and any securities issued in respect thereof or exchange therefor, may bear one or all of the legends substantially in the form set forth below:

(a) “THE SECURITIES REFERENCED HEREIN HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AND HAVE BEEN ACQUIRED FOR

INVESTMENT AND NOT WITH A VIEW TO, OR IN CONNECTION WITH, THE SALE OR DISTRIBUTION THEREOF. NO SUCH SALE OR DISTRIBUTION MAY BE EFFECTED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR AN OPINION OF COUNSEL IN A FORM SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE SECURITIES ACT OF 1933.”

(b) Any legend required by the securities laws of any state to the extent such laws are applicable to the shares represented by the certificate so legended.

3.11. Ownership. The Holder owns (of record and beneficially) the Exchanged Shares free and clear of any restrictions on transfer, mortgage, charge, pledge, lien option restriction, right of first refusal, right of pre-emption or third party right or interest other than pursuant to an agreement to which the Company is a party. No consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any foreign, state or local government authority or other party on the part of such Holder is required in connection with the consummation of the transactions contemplated by this Agreement. Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will cause such Holder to be in violation or breach of, or default under, any term or provision of any mortgage, indebtedness, indenture, contract, agreement, instrument, judgment or decree to which it is a party or by which it is bound.

3.12. Tax Advisors. The Holder has reviewed with its own tax advisors the U.S. federal, state, local and foreign tax consequences of this transaction and the transactions contemplated Exchange. With respect to such matters, such Holder relies solely on such advisors and not on any statements or representations of the Company or any of its agents, written or oral. The Holder understands that it (and not the Company) shall be responsible for its own tax liability that may arise as a result of this Agreement or the transactions contemplated hereby.

4. Representations and Warranties of the Company. The Company hereby represents and warrants to the Holders as follows:

4.1. Authorization. All corporate action on the part of the Company and its directors, officers and stockholders necessary for the authorization, execution and delivery of this Agreement by the Company, the authorization, issuance and delivery of the Series C-1A Preferred, Series C-1B Preferred and Series C-2A Preferred, and the performance of all of the Company’s obligations under this Agreement has been taken or will be taken prior to the Closing. The Agreement, when executed and delivered by the Company, shall constitute valid and binding obligations of the Company, enforceable in accordance with their terms, except (i) as limited by laws of general application relating to bankruptcy, insolvency and the relief of debtors, and (ii) as limited by rules of law governing specific performance, injunctive relief or other equitable remedies and by general principles of equity.

4.2. Capitalization.

(a) Immediately prior to the Closing, the authorized capital stock of the Company will consist of (1) 1,010,012,813 shares of Common Stock, (i) 759,354,758 of which are designated Class A Common Stock (the “**Class A Common**”), 51,761,205 of which are issued and outstanding, and (ii) 250,658,055 of which of which are designated Class B Common Stock, 250,658,055 of which are issued and outstanding; and (2) 308,068,771 shares of Preferred Stock, (i) 46,320,045 of which of which are designated Series A Preferred Stock, 46,320,045 of which are issued and outstanding, (ii) 53,494,262 of which are designated Series B Preferred Stock, 53,494,262 of which are issued and

outstanding, (iii) 58,810,045 of which are designated Series C Preferred Stock, 58,810,045 of which are issued and outstanding; (iv) 23,008,367 of which are designated Series C-1 Preferred Stock, 23,008,367 of which are issued and outstanding; (v) 18,508,335 of which are designated Series C-1A Preferred Stock, none of which are issued and outstanding; (vi) 4,500,032 of which are designated Series C-1B Preferred Stock, none of which are issued and outstanding; (vii) 32,975,872 of which are designated Series C-2 Preferred Stock, 32,975,872 of which are issued and outstanding; (viii) 32,975,872 of which are designated Series C-2A Preferred Stock, none of which are issued and outstanding; (ix) 4,500,032 of which are designated Series C-1B* Preferred Stock, none of which are issued and outstanding; (x) 32,975,872 of which are designated Series C-2A* Preferred Stock, none of which are issued and outstanding; and (xi) 37 of which are designated Series D-2A Preferred Stock, 37 of which are issued and outstanding. The Common Stock and the Preferred Stock shall have the rights, preferences, privileges and restrictions set forth in the Restated Certificate.

(b) The outstanding shares have been duly authorized and validly issued in compliance with applicable laws, and are fully paid and nonassessable.

(c) The Company has reserved:

(i) the Adjusted Shares for issuance pursuant to the Exchange;

(ii) shares of Class A Common Stock (as may be adjusted in accordance with the provisions of the Restated Certificate) for issuance upon conversion of the Adjusted Shares (the “**Conversion Shares**”);

(iii) up to an aggregate of 43,681,485 shares proposed to be issued pursuant to one or more equity grants, 39,070,955 of which are to be issued to Elizabeth Holmes (the shares to be issued to Elizabeth Holmes, the “**Proposed Equity**”); and

(iv) 104,209,647 shares of Class A Common authorized for issuance to employees, consultants and directors pursuant to its 2004 Stock Plan and 2013 Stock Plan, under which options to purchase an aggregate of 2,620,384 shares of Class A Common are issued and outstanding as of the date of this Agreement and restricted stock units amounting to 2,542,995 shares of Class A Common have been granted as of the date of this Agreement.

(d) The Adjusted Shares, when issued and delivered and paid for in compliance with the provisions of the will be validly issued, fully paid and nonassessable. The Conversion Shares have been duly and validly reserved and, when issued in compliance with the provisions of this Agreement, the Restated Certificate and applicable law, will be validly issued, fully paid and nonassessable.

4.3. Governmental Consent. No consent, approval or authorization of or designation, declaration or filing with any governmental authority on the part of the Company is required in connection with the valid execution and delivery of this Agreement, or the offer or issuance of the Adjusted Shares and the Conversion Shares, or the consummation of any other transaction contemplated by this Agreement, except (i) filing of the Restated Certificate with the office of the Secretary of State of the State of Delaware, (ii) the filing of such notices as may be required under the Securities Act of 1933, as amended (the “**Securities Act**”) and (iii) such filings as may be required under applicable state securities laws.

5. Most Favored Terms. In the event that the Company, within the four (4) years following the Closing, enters into an equity transaction involving the issuance of equity securities by the Company with holders of First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred, as applicable, who are not parties to this Agreement (“*Nonparticipating Holders*”) that provides such Nonparticipating Holders with a more favorable conversion rate adjustment, a more favorable adjusted First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred liquidation preference, as applicable, or otherwise reduces the effective investment price of the First Series C-1 Preferred, Second Series C-1 Preferred, or Series C-2 Preferred, as applicable, held by such Nonparticipating Holders as compared to that provided in the Exchange, then the Company shall allow the Holder to participate in such equity transaction on the same terms.

6. Relinquishment of Equity. Elizabeth Holmes hereby agrees that she shall, at her election, waive any right to receive the Proposed Equity and/or contribute to the Company shares of Company capital stock owned by her, in an amount equal, in the aggregate and on an as-converted to Class A Common basis, to the sum of (i) the number of additional shares of Class A Common issuable upon conversion of the Series C-2A Preferred actually issued pursuant to the Exchange as a result of the reduction of the conversion price to \$5.00 from \$17.00 for the Series C-2 Preferred exchanged and (ii) the number of additional shares of Class A Common issuable upon conversion of the Series C-1B Preferred actually issued pursuant to the Exchange as a result of the reduction of the conversion price to \$5.00 from \$15.00 for the Second Series C-1 Preferred exchanged (the “*Founder Waiver*”). Such waiver and/or contribution will occur upon the earlier of (x) September 30, 2017, (y) promptly following receipt by the Company of a 409A valuation for the Company’s common stock and determination by the Board of the fair market value of the Company’s common stock, and (z) or a Change of Control of the Company. For purposes of this Section 6, a “*Change of Control*” means (i) a consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, other than any such consolidation, merger or reorganization in which the shares of capital stock of the Company immediately prior to such consolidation, merger or reorganization, continue to represent a majority of the voting power of the surviving, resulting or acquiring entity immediately after such consolidation, merger or reorganization; (ii) any transaction or series of related transactions to which the Company is a party in which in excess of 50% of the Company’s voting power is transferred; or (iii) the sale or transfer of all or substantially all of the Company’s assets, or the exclusive license of all or substantially all of the Company’s material intellectual property; *provided* that a Change of Control shall not include any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by the Company or any successor, indebtedness of the Company is cancelled or converted, or a combination thereof. Ms. Holmes has elected to provide the Founder Waiver so that the additional shares issuable upon conversion of the new Series C-1B Preferred and Series C-2A Preferred of the Company do not result in dilution of the interest in the Company held by employees, investors and other stockholders.

7. Confidentiality. The parties agree that this Agreement and the transactions contemplated hereby (including the Exchange) shall constitute material nonpublic information of the Company and confidential information pursuant to Section 3.2 of that certain Amended and Restated Investors’ Rights Agreement dated as of even date herewith, by and among the Company and the other parties thereto, and shall be subject to the confidentiality obligations set forth therein.

8. Governing Law.

8.1. Choice of Law. This Agreement and any claim, cause of action, dispute, suit or other proceeding among the parties arising out of or related in any manner to the Agreement shall be

governed, construed and interpreted in accordance with the laws of the state of Delaware, without giving effect to principles of conflicts of law.

8.2. Exclusive Forum. EACH PARTY HEREBY CONSENTS TO THE EXCLUSIVE JURISDICTION OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE FOR THE PURPOSE OF ANY CLAIM, CAUSE OF ACTION, DISPUTE, SUIT OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT.

8.3. Judgment Enforceability. EACH PARTY AGREES THAT A FINAL JUDGMENT IN ANY SUCH ACTION OR PROCEEDING IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE WILL BE CONCLUSIVE AND MAY BE ENFORCED IN ANY OTHER JURISDICTION (INCLUDING, WITHOUT LIMITATION, THE APPROPRIATE COURTS OF THE JURISDICTION IN WHICH IT IS RESIDENT OR IN WHICH ANY OF ITS PROPERTY OR OFFICES IS LOCATED) BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW. EACH PARTY HEREBY CONSENTS TO PERSONAL JURISDICTION AND VENUE BY SUCH COURT OVER SUCH PARTY AND WAIVES ANY DEFENSE OF INCONVENIENT FORUM WITH RESPECT THERETO.

9. Revocation. Once the Holder executes and submits the Agreement to the Company, it hereby covenants not to revoke its participation in the Exchange.

10. Successors and Assigns. This Agreement will be binding upon each Holder and its successors and assigns (if any).

11. Severability. In the event that any provision of this Agreement, or the application of any such provision to any person or set of circumstances, will be determined to be invalid, unlawful, void or unenforceable to any extent, the remainder of this Agreement, and the application of such provision to persons or circumstances other than those as to which it is determined to be invalid, unlawful, void or unenforceable, will not be impaired or otherwise affected and will continue to be valid and enforceable to the fullest extent permitted by law.

12. Entire Agreement. This Agreement, including the Release, constitutes the full and entire understanding and agreement between the parties with regard to the subjects hereof and supersedes any other agreements, representations or understandings (whether oral or written and whether express or implied) which relate to the subject matter hereof. No party will be liable for or bound to any other in any manner by any oral or written representations, warranties, covenants and agreements except as specifically set forth in this Agreement.

13. Amendments. This Agreement may not be amended, modified, altered or supplemented other than by means of a written instrument duly executed and delivered on behalf of the Company and the holders of a majority of the shares of First Series C-1 Preferred, Second Series C-1 Preferred, and Series C-2 Preferred together as a single class held (or after the execution hereof, previously held) by the Holders; *provided, however*, that Section 6 of this Agreement may not be amended or waived without the written consent of Elizabeth Holmes. Notwithstanding the foregoing, the Company may amend this Agreement without consent to add additional holders of Series C-1 Preferred and Series C-2 Preferred hereunder. Notwithstanding anything to the contrary contained herein, at any time prior to the Effective Time, the Company may, in its discretion, rescind its offer to complete the Exchange and this Agreement will not become effective.

14. Expenses. Each party shall pay all costs and expenses that it incurs with respect to the negotiation, execution, delivery and performance of the Agreement; provided, however, that the Company shall, at the Closing, reimburse the reasonable fees of and expenses of one special counsel to the Holders up to a previously agreed limit and shall reimburse the reasonable fees and expenses of special counsel to Elizabeth Holmes.

15. Waiver of Conflicts. Each Holder acknowledges that: (a) it has read this Agreement; (b) it has been represented in the preparation, negotiation and execution of this Agreement by legal counsel of its own choice or has voluntarily declined to seek such counsel; and (c) it understands the terms and consequences of this Agreement and is fully aware of the legal and binding effect of this Agreement. Each Holder understands that Elizabeth Holmes has been represented by Cooley LLP in the preparation, negotiation and execution of this Agreement and that Madrone Partners, L.P. and Soda Springs Partners, LLC have also been represented by Cooley LLP in the preparation, negotiation and execution of this Agreement. Each Holder also understands that Cooley LLP has represented, currently represents, or may in the future represent one or more Holders or their affiliates in matters unrelated to the transactions contemplated by this Agreement, although such matters may be of a nature similar to those contemplated by this Agreement. Each Holder understands that with respect to this Agreement, Cooley LLP has represented only Ms. Holmes, on the one hand, and Madrone Partners, L.P. and Soda Springs Partners, LLC, on the other hand, and not any other Holder or party to this Agreement. The Company and each Holder hereby acknowledge that they have had an opportunity to ask for and have obtained information relevant to such representations, including disclosure of the reasonably foreseeable adverse consequences of such representations, and hereby waives any conflict arising out of such representations with respect to the matters contemplated by this Agreement.

16. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*, www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

[Signature Page Follows]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

COMPANY:

THERANOS, INC.

By: 

Name: Elizabeth Holmes

Title: Chief Executive Officer

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

ELIZABETH HOLMES

By:  _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____
By: _____
Name: _____
Title: _____
Address: _____

HOLDER (IF AN INDIVIDUAL):

By: Alan Eisenman
Name: ALAN EISENMAN
Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

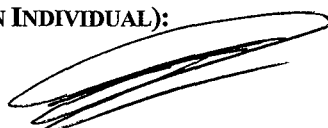
Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):


By: _____

Name:  _____
Andreas C. Dracopoulos

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Bendel Fund
By: 
Name: Christian Bolleter
Title: Asset Manager
Address: LGT Fondsleitung AG
Herrengasse 12
FL-9490 Vaduz

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Black Diamond Ventures XII-B, LLC

By: 

Name: Christopher B. Lucas

Title: Managing Director

Address: 400 N. Brand Blvd. Suite 950
Glendale, CA 91203

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: BlueCross BlueShield Venture Partner
L.P.
By: [Signature]
Name: John Banta
Title: Managing Director
Address: 225 North Michigan Avenue
Chicago, Illinois 60601-7680

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: BOIES, SCHILLER & FLEXNER LLP

By: Amy Habie
Name: Amy Habie
Title: CFO

Address: 2200 CORPORATE BLVD, NW
Suite 400
BOLTON, FL 33431

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Central Valley Administrators, Inc.

By: 

Name: Anne Wymer

Title: Authorized Signatory

Address: 3115 Ocean Front Walk, Suite 301
Marina del Rey, CA 90292

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: _____

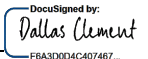
Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Cox Investment Holdings, Inc.

By:  _____
Name: Dallas Clement
Title: Authorized Signatory

Address: 6250 Peachtree Dunwoody Road
Atlanta, GA 30328

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Crofton Capital
By: Frank E Gordon
Name: Frank E Gordon
Title: Managing Partner
Address: 3102 West End Avenue
Suite 650
Nashville, TN 37203

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: David Boies

Name: David Boies

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: *Daniel Carter*

Name: DANIEL CARTER

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: DYNASTY FINANCIAL II, LLC
By RGV CORPORATION, ITS MANAGER
By: [Signature]
Name: JERRY L. TUBERGEN
Title: CEO
Address: 126 OTTAWA AVE NW
GRAND RAPIDS MI 49503

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: EOSon INVESTMENTS M Ltd
By: [Signature]
Name: Mr. M. THOMAS
Title: Director
Address: Tynhill House
77-79 Bick's Road
Douglas, Isle of Man

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: BOSON INVESTMENTS N Ltd

By: [Signature]

Name: Mr. M.J. Thomas

Title: Director

Address: Jurkall House

77-79 Bickles Road

Douglas, Isle of Man

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: George A. Shultz

Name: George P. Shultz

Address: [REDACTED]

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: GORDON FAMILY TRUST
By: [Signature]
Name: TARLEIGH B. JONES
Title: TRUSTEE
Address: _____

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Henry A. Kissinger 2014 Grantchildren's Trust

By: [Signature], Trustee

Name: Daniel L. Mosley

Title: Trustee

Address: c/o Daniel L. Mosley
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name:

Immersora Gaseo, SA. de CV.

By:

Name:

Virga Mamei Cantilmez Lopez

Title:

Attorney in Fact.

Address:

HOLDER (IF AN INDIVIDUAL):

By:

Name:

Address:

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

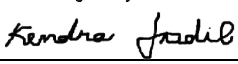
Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

DocuSigned by:

By:  _____

Name:  Kendra Fadil _____

Address: _____

 _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: LUCAS VENTURE GROUP IV, LP BY
WGGPIV, LLC ITS MANAGING MEMBER

By: 
Name: DONALD A. LUCAS
Title: MANAGING MEMBER

Address: 545 MIDDLEFIELD RD STE 220
MENLO PARK, CA 94025

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: LUCAS VENTURE GROUP XI, LLC BY
LVB GP IV, LLC ITS MANAGING MEMBER

By: Donald A. Lucas
Name: DONALD A. LUCAS
Title: MANAGING MEMBER

Address: 545 MIDDLEFIELD RD. STE 220
MENLO PARK, CA 94025

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Madore Partners L.P.
By: [Signature]
Name: Thomas A. Patterson
Title: Managing Member
Address: _____

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Mendenhall TF Partner
By: [Signature]
Name: Patrick M. Mendenhall
Title: General Partner
Address: 27 W. TEJALCE
HOUSTON TX 77007

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Mosley Family Holdings LLC
By: [Signature]
Name: Daniel L. Mosley
Title: Manager
Address: c/o Grant, Swartz & Pearce LLP
825 Eighth Avenue
New York, NY 10019

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

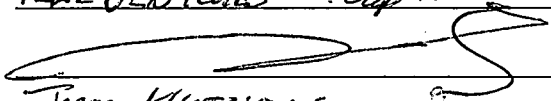
Entity Name: PEER VENTURES Group III L.P.
By: [Signature]
Name: James Hutchings
Title: Managing Director
Address: 3000 Santa Rita Rd. 3-125
MENLO PARK, CA 94025

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: PERI VENTURES GROUP IV, LP.
By: 
Name: JAMES HUTCHINSON
Title: MANAGING DIRECTOR
Address: 3000 Sand Hill Rd. 3-125

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

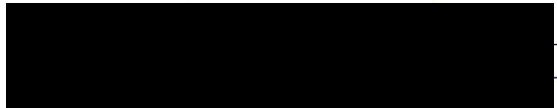
Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: 

Name: Richard M. Forrester

Address: 

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

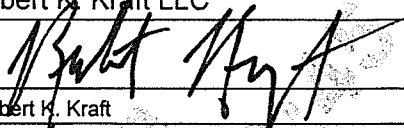
Address: _____

Riley P. Secord
RILEY P. SECORD



The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Robert K. Kraft LLC
By: 
Name: Robert K. Kraft
Title: Sole Director of its Manager
Address: C/O The Kraft Group, One Patriot Place
Foxborough, MA 02035

HOLDER (IF AN INDIVIDUAL):

By: _____
Name: _____
Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: _____

By: _____

Name: _____

Title: _____

Address: _____

HOLDER (IF AN INDIVIDUAL):

By: X Sherie Eisenman

Name: SHERIE EISENMAN

Address: [REDACTED]

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: SANDBOX CO-INVESTMENT FUND I, LLC

DocuSigned by:

By: 

Name: Matthew Downs

Title: Managing Director

Address: 1000 West Fulton Market, Suite 213
Chicago, IL 60607

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

[SIGNATURE PAGE TO THERANOS, INC. EXCHANGE AND RELEASE AGREEMENT]

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: Soda Springs Partners, LLC

By: 

Name: Richard D. Chapman

Title: Vice President

Address: 110 NW 2nd Street, Suite 300

Bentonville, AR 72712

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

The parties have caused this Exchange and Release Agreement to be executed and delivered as of the date first above written.

HOLDER (IF AN ENTITY):

Entity Name: TETON CAPITAL

By: [Signature]

Name: LARRY GERDES

Title: GEN. PTNR

Address: 3000 SANDHILL Rd

Bldg 3-125

Menlo Park, Ca. 94025

HOLDER (IF AN INDIVIDUAL):

By: _____

Name: _____

Address: _____

EXHIBIT C

To

Declaration of Jeffrey B. Coopersmith

From: Bob Gordon
To: Heather King (hking@theranos.com)
Sent: 7/9/2016 12:10:30 AM
Subject: Theranos - Termination Agreement
Attachments: Theranos SWY Termination Agmt - Executed 7-8-16.pdf

Executed version attached.

HIGHLY CONFIDENTIAL
FOIA CONFIDENTIAL TREATMENT REQUESTED BY SAFEWAY, INC.



SWYSEC_000002684

**AGREEMENT TERMINATING MASTER PURCHASE AGREEMENT
AND RELEASING CLAIMS**

This Agreement Terminating the Master Purchase Agreement and Releasing Claims ("Agreement") is entered into effective as of July 8, 2016 by and between Safeway Inc., a Delaware corporation ("Safeway"), and Theranos, Inc., a Delaware corporation ("Theranos"). Safeway and Theranos are referred to collectively in this Agreement as the "Parties" and each individually as a "Party."

WHEREAS, Safeway and Theranos are parties to that certain Theranos Master Purchase Agreement dated as of September 20, 2010 (the "MPA");

WHEREAS, each Party has undertaken efforts to perform services under the MPA;

WHEREAS, the Parties have disputes about the obligations of the MPA, the ability to perform under the MPA, and the adequacy of such performance;

WHEREAS, the Parties seek to avoid litigation with respect to the performance of their respective obligations under the MPA;

WHEREAS, to resolve any potential legal dispute between the Parties, Safeway and Theranos desire to terminate the MPA, the Option Agreement, dated July 30, 2010, issued in connection therewith, and the Initial Note and Additional Note (the "Notes") issued in connection therewith (the MPA, the Option Agreement and the Notes, collectively, the "Subject Agreements"), to provide for the specified payment, and to release all claims the Parties may have against each other in connection with the Subject Agreements, together with all other claims known and unknown.

NOW, THEREFORE, the Parties agree as follows:

1. Termination of MPA. Effective as of July 8, 2016 (the "Effective Date"), the Subject Agreements shall be terminated in their entirety and shall be of no further force or effect, notwithstanding any provision in the Subject Agreements to the contrary, including Section 26.e. of Schedule B to the MPA. Safeway and Theranos acknowledge and agree that upon such termination, (i) the Notes shall be deemed fully paid and discharged for all purposes and all obligations of Theranos under the Notes shall be deemed satisfied in full for all purposes and (ii) all obligations of Theranos with respect to inventory payments under the MPA, including the repayment thereof, shall be deemed satisfied in full for all purposes.

2. Payment by Theranos. Within 10 calendar days of the Effective Date, Theranos shall pay to Safeway, in immediately available funds, the aggregate amount of 15 million five hundred thousand dollars (\$15,500,000.00). Such funds shall be paid by wire transfer, to the following account:

Bank of America
 ABA# 0260-09593
 Credit: Safeway Inc.
 Acct.#: 12333-03048

Notwithstanding any other provision herein to the contrary, the Parties agree that any failure by Theranos to timely complete this required payment will be a material breach of this Agreement. The Parties agree that in the event of such material breach, Safeway shall have the option, in its sole discretion, to enforce this Agreement and take legal action to recover the payment, which is a material term of this Agreement, or to rescind this Agreement rendering the Agreement void ab initio.

3. Release by Theranos. In consideration of the terms set forth in this Agreement, Theranos and its respective past, present and future parents, subsidiaries, affiliates, stockholders, officers, directors, partners, agents, servants, employees, representatives, family members, attorneys, heirs, executors, conservators, assigns, insurers, trustees, receivers, administrators, predecessors-in-interest, successors-in-interest, and any person claiming, purporting to claim, who can claim or who could have claimed, by, through or under, whether directly or indirectly (the "Theranos Releasers"), hereby irrevocably, unconditionally and fully release and forever discharge to the maximum extent possible, as of the Effective Date, Safeway and its respective past, present and future parents, subsidiaries, stockholders, officers, directors, partners, principals, agents, servants, employees, attorneys, conservators, insurers, trustees, predecessors-in-interest and successors-in-interest (the "Safeway Releasees") from any and all Claims. For the avoidance of doubt, the Claims released here include but are not limited to any claims relating in any way to the Subject Agreements, the relationship of the Parties under the Subject Agreements, any status, term or condition of the Subject Agreements or the termination of the Subject Agreements, or any inventory payment, promissory or convertible note, debt, equity or other obligation or interest. This release extends to and includes, but is not limited to, any Claims by the releasing Party, however denominated, for: breach of any express or implied written or oral contract, including, without limitation, the Subject Agreements; impairment of economic activities or opportunities; defamation; breach of any express or implied covenant of good faith and fair dealing; and any and all other common law or statutory contract and/or tort claims. "Claims" means, individually or collectively, as applicable, any and all actions, causes of action, counterclaims, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, rights, claims, demands, liabilities, setoffs, recoupments, losses, and rights to reimbursement, subrogation, contribution, indemnification or other payment, costs or expenses (including attorneys' fees), in each case whether arising under contract, in law or in equity or by operation of law, of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, and whether representing a past, present or future obligation, in each case that are connected with, arise out of, relate to or are otherwise based as a whole or in part on any acts, omissions, facts, matters, transactions or occurrences prior to the Effective Date, directly or indirectly, relating to any or all of (i) the Subject Agreements, any ancillary document entered into in connection therewith, any of the transactions contemplated by any of the foregoing, and any actions, inactions or omissions by any person thereunder and (ii) any aspect of any of the dealings or relationships between or among any of

the Safeway Releasees, on the one hand, and any or all of the Theranos Releasees, on the other hand, prior to the Effective Date. Notwithstanding anything contained herein to the contrary, nothing in this definition of "Claims" shall be construed to include any claims or rights to which the Parties are entitled in connection with a breach of any provision, representation, warranty, covenant or agreement contained in this Agreement, or in any concurrently executed or future agreement between the Parties.

The Theranos Releasors acknowledge and understand that hereafter they may discover or appreciate claims, facts, issues or concerns in addition to or different from those that they now know or believe to exist with respect to the subject matter of this Agreement that, if known or suspected at the time of execution of this Agreement, might have materially affected the termination embodied herein. The Theranos Releasors nevertheless agree that the release and waiver described above applies to any such additional or different claims, facts, issues or concerns.

Theranos acknowledges that it is familiar with the provisions of California Civil Code section 1542 ("A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor") and specifically waives all rights and releases such claims as referenced therein and in any similar statute or law.

Theranos agrees never to institute a claim of any kind against any Safeway Releasee for any claim, demand, action and/or cause of action released herein. If any Theranos Releasor violates this Agreement by instituting any such claim, then such Theranos Releasor agrees to pay all costs and expenses of defending against the claim incurred by the Safeway Releasee, including reasonable attorney fees, and all further costs and fees, incurred in connection with the defense of the claim.

4. Release by Safeway. In consideration of the terms set forth in this Agreement, Safeway and its respective past, present and future parents, subsidiaries, affiliates, stockholders, officers, directors, partners, agents, servants, employees, representatives, family members, attorneys, heirs, executors, conservators, assigns, insurers, trustees, receivers, administrators, predecessors-in-interest, successors-in-interest, and any person claiming, purporting to claim, who can claim or who could have claimed, by, through or under, whether directly or indirectly (the "Safeway Releasors"), hereby irrevocably, unconditionally and fully release and forever discharge to the maximum extent possible, as of the Effective Date, Theranos and its respective past, present and future parents, subsidiaries, stockholders, officers, directors, partners, principals, agents, servants, employees, attorneys, conservators, insurers, trustees, predecessors-in-interest and successors-in-interest (the "Theranos Releasees") from any and all Claims. For the avoidance of doubt, the Claims released here include but are not limited to any claims relating in any way to the Subject Agreements, the relationship of the Parties under the Subject Agreements, any status, term or condition of the Subject Agreements or the termination of the Subject Agreements, or any inventory payment, promissory or convertible note, debt, equity or other obligation or interest. This release extends to and includes, but is not limited to, any Claims by the releasing Party, however denominated, for: breach of any express or implied

written or oral contract, including, without limitation, the Subject Agreements; impairment of economic activities or opportunities; defamation; breach of any express or implied covenant of good faith and fair dealing; and any and all other common law or statutory contract and/or tort claims.

The Safeway Releasors acknowledge and understand that hereafter they may discover or appreciate claims, facts, issues or concerns in addition to or different from those that they now know or believe to exist with respect to the subject matter of this Agreement that, if known or suspected at the time of execution of this Agreement, might have materially affected the termination embodied herein. The Safeway Releasors nevertheless agree that the release and waiver described above applies to any such additional or different claims, facts, issues or concerns.

Safeway acknowledges that it is familiar with the provisions of California Civil Code section 1542 ("A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor") and specifically waives all rights and releases such claims as referenced therein and in any similar statute or law.

Safeway agrees never to institute a claim of any kind against any Theranos Releasee for any claim, demand, action and/or cause of action released herein. If any Safeway Releasor violates this Agreement by instituting any such claim, then such Safeway Releasor agrees to pay all costs and expenses of defending against the claim incurred by the Theranos Releasee, including reasonable attorney fees, and all further costs and fees, incurred in connection with the defense of the claim.

5. Covenant Not To Sue. Each Party covenants and agrees never to commence, aid in any way, prosecute or cause or permit to be commenced or prosecuted against the other Party any action or other proceeding based upon any claim which is covered by this Agreement and the foregoing release, excluding, however, either Party's right to enforce this Agreement.

6. No Reliance. No Duty to Disclose. No Admission.

(a) No Reliance and No Duty to Disclose. Each of the Parties hereto, on behalf of itself and its respective Theranos Releasors and Safeway Releasors, in any capacity, agrees and acknowledges that (a) except as expressly provided in this Agreement, no other Party hereto or any other Releasee, in any capacity, has warranted or otherwise made any representations to it or any of its Releasors or Releasees concerning any Claim released in this Agreement (including any representation concerning the existence, nonexistence, validity or invalidity of any Claim released in this Agreement) and no Releasor has relied on any Releasee in providing the releases and covenants not to sue in this Agreement, (b) the validity and effectiveness of the foregoing releases and covenants not to sue in this Agreement do not depend in any way on any such representations or warranties or the accuracy, completeness or validity thereof, (c) no other Party hereto or any other Releasee, in any capacity, has any duty to disclose or provide any facts or documents (whether material or immaterial, known or unknown,

suspected or unsuspected) to it or any other Releasor, including any facts or documents which, if known by any Releasor, might have caused such Releasor or any Party to which such Releasor is affiliated not to execute and deliver this Agreement, and (d) each such release and covenant not to sue shall remain in full force and effect even if any facts or documents (whether material or immaterial, known or unknown, suspected or unsuspected) were not disclosed or provided (whether intentionally, unintentionally or otherwise) by any Releasee to any Releasor, which facts or documents, if known by such Releasor, might have caused such Releasor or any Party to which such Releasor is affiliated not to execute and deliver this Agreement. Nothing contained herein is intended to impair or otherwise derogate from any of the representations, warranties or covenants expressly set forth in this Agreement. "Releasees" means the Safeway Releasees and the Theranos Releasees. "Releasors" means the Safeway Releasors and the Theranos Releasors.

(b) No Admission. Nothing in this Agreement shall be construed as an admission by any Releasor or Releasee of the existence of any Claim released in this Agreement or of any liability with respect to any or all of such Claim released in this Agreement or any other past or future act, omission, fact, matter, transaction or occurrence.

7. Sole Right To Claims. Each Party represents and warrants that no other person or party had or has any interest in the claims referred to in this Agreement; that it has the sole right and exclusive authority to execute this Agreement; and that it has not sold, assigned, transferred, conveyed or otherwise disposed of any claim or demand relating to any matter covered by this Agreement.

8. Confidentiality.

(a) The Parties agree to keep the terms of this Agreement confidential and agree not to disclose the terms of this Agreement (1) except as necessary to enforce its terms; and (2) except that the Parties may disclose in confidence to their respective attorneys, officers, agents, insurers, tax advisors and tax return preparers, who need to know them and have agreed, either as a condition to employment or in order to obtain such terms and conditions, or have a professional duty, to be bound by terms and conditions substantially similar to those of this Agreement, the terms of this Agreement and any amounts paid and/or received hereunder; and (3) except as otherwise required by law, rule or regulation, or as required by a court or in response to a lawful request by a governmental authority, or is otherwise necessary to establish rights or enforce obligations under this Agreement, but, in each case, only to the extent that any such disclosure is necessary. Notwithstanding the foregoing, no Party shall disclose or use any Confidential Information of the other Party for any purpose without the other Party's prior written consent, including Confidential Information acquired prior to the Effective Date. All Confidential Information shall remain the property of the Party that disclosed such Confidential Information (or its licensors, as applicable), including any right to make, use or sell any product embodying any Confidential Information. "Confidential Information" means the Subject Agreements, all documents, instruments and agreements related thereto, and all information disclosed by either Party in connection with the Subject Agreements, either prior, on or after the date hereof. "Confidential Information" does not include information which: (i) prior to disclosure by the Party disclosing such information, is or becomes generally known through no fault of the Party receiving such information; (ii) is known to the Party receiving such information at the time of

disclosure, as evidenced by its records; (iii) is furnished to the Party receiving such information by a third party as a matter of right and without restriction on disclosure; (iv) is independently developed by the Party receiving such information without any breach of the Subject Agreements; or (v) is otherwise necessary to establish rights or enforce obligations under this Agreement, but, in each case, only to the extent that any such disclosure is necessary. In the event the receiving Party receives a court order, or is otherwise required by law, to disclose any Confidential Information, the receiving Party will (a) notify Discloser promptly upon receipt of such court order or other request for disclosure, such that Discloser has time to object and/or move for a protective order or confidential treatment and (b) to the extent the information to be disclosed in response to a court order must be filed in court, file any information disclosed in response to such order under seal and/or request that the court seal such Confidential Information. Except as may ultimately be required by such court order or law, the receiving Party's obligations with regard to such Confidential Information, as set forth above, will remain in full force and effect.

For the avoidance of doubt, the provisions of this Paragraph 8(a) apply to the Party as of the Effective Date but do not apply to and cannot be enforced against the Party based on the acts or omissions of any persons who are former employees as of the time of an alleged breach of this provision.

(b) Promptly following the Effective Date, the Parties will provide written instructions to their respective senior executives (Senior Vice Presidents or more senior) that they shall not make, either directly or indirectly, any oral or written disparaging statements or representations of or concerning the other Party or its affiliates, or any of their businesses, or any of their current or former officers, directors, employees, shareholders, managers or investors, relating to the Subject Agreements or this Agreement; provided, however, that nothing herein shall prohibit (i) necessary communications between the Parties in connection with this Agreement, (ii) either Party from disclosing truthful information if legally required (whether by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process including cooperation with any law enforcement agencies) or (iii) either Party from acting in good faith to enforce such Party's rights under this Agreement. The Parties agree that providing the written instruction to senior executives described in this subparagraph will discharge their respective obligations under this subparagraph.

(c) Promptly following the Effective Date, the Parties will work together in good faith to establish an agreed upon message that each Party will use if asked to comment on the Parties' relationship.

9. Medical Restriction Waiver.

In some locations (e.g., shopping centers) where Safeway operates, there are restrictions against clinics or facilities that specialize in the delivery of medical services and/or advice, or businesses that are engaged in routine, diagnostic or prognostic testing or screening services of the type conducted by medical laboratories, or in the taking, collecting or receiving at such premises specimens or samples for such purposes ("Medical Service Business," the restriction on

which is hereinafter referred to as a "Medical Service Business Restriction"). With respect to such locations that have a Medical Service Business Restriction, there may be instances where Theranos seeks the assistance of Safeway in removing the restriction so that Theranos can place its business in such a location. In such circumstances, the following provisions shall apply:

(a) In locations where Safeway has a Lab Business on its premises at the time of Theranos' request, or where a Lab Business has executed an agreement to occupy such Safeway premises, Safeway shall have no obligation to Theranos with respect to any such Medical Service Business Restriction. Where Safeway has entered into a letter of intent with a Lab Business for locating in such Safeway premises at the time of Theranos' request, Safeway must so notify Theranos no later than 10 days from the request, and Safeway will have 180 days from Theranos' request to execute a definitive agreement at such Safeway premises with such Lab Business. If such definitive agreement is not executed within such 180-day period, Safeway will waive any such Medical Service Business Restriction as to Theranos, and so notify the landlord of its waiver within 10 days of the end of the 180-day period. A "Lab Business" means a Medical Service Business that engages in routine, diagnostic or prognostic testing or screening services provided by a CLIA-certified laboratory, or in the taking, collecting or receiving specimens or samples for such purposes.

(b) In all other locations, after Theranos has discovered that a specific location where Theranos intends to place its business has a Medical Service Business Restriction, where Theranos provides Safeway with written notice that it has entered into a letter of intent with the applicable landlord for the placement of its business in a such location, Safeway will waive any such Medical Service Business Restriction as to Theranos that is contained in its lease, and so notify the landlord of its waiver within 10 days of Theranos' notice to Safeway. If the restriction arises from a source other than its lease, Safeway shall notify the landlord within 10 days of Theranos' notice to Safeway that it has no objection to Theranos occupying space in such location. For each such location where Safeway has granted a waiver and/or notified the landlord, Theranos shall have 180 days from the date of such notification to the landlord within which to execute a definitive agreement or definitive lease at such location. In the event Theranos has not executed a definitive agreement or definitive lease within such 180-day period, Safeway may withdraw its waiver and/or notify the landlord and Theranos that it no longer seeks to have the Medical Service Business Restriction lifted, and Safeway shall have no further obligation to Theranos with respect to such location.

Except as set forth in this Paragraph 9, Safeway shall have no other duties or obligations with respect to Theranos' requests or efforts to locate its business in locations where there is a Medical Service Business Restriction, including but not limited to giving up other occupancy, signage or parking rights, or seeking or obtaining consents or approvals from government bodies, third parties, or any other person or entity.

10. Governing Law. The construction, interpretation and enforcement of this Agreement shall be governed by the internal laws of the State of California applicable to

contracts made and to be performed wholly within such state, without regard to the conflict of laws rules of any jurisdiction.

11. Dispute resolution.

(a) Except as set forth in Paragraph 11(b), regarding a material breach arising from Theranos's failure to timely pay amounts owed as set forth in Paragraph 2, any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in San Francisco County, California, before three (3) neutral arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules & Procedures, except that the Parties shall agree to (or the arbitration panel shall determine) the scope of discovery and discovery schedule, including with respect to the timing and extent of document production, expert disclosures, and number of depositions. Within thirty (30) days of service of the demand for arbitration, each Party shall appoint one arbitrator and the two Party-appointed arbitrators shall, within twenty (20) days of the appointment of the second arbitrator, appoint the third arbitrator, who shall chair the arbitral tribunal. The Parties shall have no ex parte communications with potential arbitrators and the arbitrators shall not know which party appointed them. The Panel shall have the right to grant legal and equitable relief (including injunctive relief and specific performance) and shall award costs, including reasonable legal fees and costs of arbitration, and interest to the prevailing party. The arbitration proceeding and all testimony, filings, documents, award, and any information relating to or presented during the proceedings shall be deemed to be confidential information not to be disclosed to any other party. Judgment on the award may be entered in any court having jurisdiction.

(b) In the event of a material breach arising from Theranos's failure to timely pay amounts owed as set forth in Paragraph 2, and in the event Safeway elects in its sole discretion to enforce rather than terminate this Agreement, the Parties agree that Safeway shall have the option, in its sole discretion, to take legal action to recover the amounts owed in any court of competent jurisdiction, or in accordance with the arbitration provisions of Paragraph 11(a). The parties further agree that if Safeway elects to enforce this Agreement in any Court of competent jurisdiction, that Court shall award costs, including reasonable legal fees and interest, to the prevailing party.

12. Severability. In case any provision of this Agreement shall be determined to be invalid, illegal or unenforceable for any reason, the remaining provisions of this Agreement shall be unaffected and unimpaired thereby and shall remain in full force and effect to the fullest extent permitted by law.

13. Counterparts. This Agreement may be signed in counterpart originals with the same force and effect as though a single original were executed.

14. Entire Agreement. This Agreement constitutes the entire agreement of the Parties hereto with respect to the subject matter of this Agreement, and this Agreement supersedes all

prior agreements between the Parties with respect to the subject matter covered herein, whether written or oral, except as otherwise expressly provided herein.

15. **Notices.** All notices, requests and other communications hereunder must be in writing and shall be deemed effective upon actual receipt if delivered personally; on the date receipt is acknowledged or refused if mailed by certified mail, postage prepaid, return receipt requested; on the next business day if by overnight delivery by a nationally recognized, reputable, overnight courier; and in any case shall be addressed to the parties at the following addresses:

if to Theranos, to:

Theranos, Inc.
1701 Page Mill Road
Palo Alto, CA 93404
Attention: Heather King
email: hking@theranos.com

if to Safeway, to:

Safeway
11555 Dublin Canyon Road
Pleasanton, CA 94588
Attention: Bob Gordon
Email: bob.gordon@albertsons.com

IN WITNESS WHEREOF, each of the Parties has executed this Agreement Terminating Master Purchase Agreement and Releasing of Claims as of the date specified next to such Party's signature below.

Dated: July 8, 2016

Safeway Inc.

By: [Signature]
Name: R A Gordon
Its: EvP, General Counsel

Dated: July 8, 2016

Theranos, Inc.

By: [Signature]
Name: Heather King
Its: General Counsel